DOCUMENT RESUME

ED 336 319 SO 021 462

TITLE	Contemporary Perspectives on the Constitution and Separation of Powers.
INSTITUTION	American Bar Association, Chicago, Ill. Special Committee on Youth Education for Citizenship.
SPONS AGENCY	Commission on the Bicentennial of the United States Constitution, Washington, DC.
REPORT NO	ISBN-0-89707-622-2
PUB DATE	90
CONTRACT	89-CB-CX-0015
NOTE	59p.; Presentations made at the Constitutional Institute for Teachers (Washington, DC, June 1989).
AVAILABLE FROM	American Bar Association, Special Committee on Youth Education for Citizenship, 750 North Lake Shore Drive, Chicago, IL 60611.
PUB TYPE	Reports - Descriptive (141) -- Speeches/Conference Papers (150)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Constitutional History; *Constitutional Law; *Governmental Structure; *Law Related Education; Political Science; Secondary Education; United States History
IDENTIFIERS	*Separation Of Powers; *United States Constitution

ABSTRACT

A collection of essays designed to provide educators and other interested individuals with contemporary perspectives on the U.S. Constitution and separation of powers is presented. Separation of powers refers to one of the enduring principles of the U.S. constitutional system of government, in which governmental powers are subject to a division of labor in terms of function. The following essays are included: Origins of Separation of Powers and Mixed Government (Murray Dry); The Separation of Powers in Colonial and Early National Experience (Donald S. Lutz); Origins of Separation of Powers and the Judiciary (James R. Stoner, Jr.); Separation of Powers, Judicial Law Making and the Preservation of Freedom (Robert Peck); Separation of Powers and the Power of the Purse (Kate Stith); Separation of Powers and Current Relations between Congress and the President (Robert A. Strong); Checks and Balances: Adjusting the Constitution to Meet Modern Circumstances (Donald Robinson); The Framers' View of Executive Power (Daniel Troy); The Dynamics of Constitutional Decision Making: The Real Picture (Louis Fisher); Sentencing Commission Tests Separation of Powers--and Passes (John R. Steer); Tough Times for Separation of Powers (Patrick McGuigan); and The FCC and the Need for Independent Agencies (Stephen Sharp). (DB)

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Contemporary Perspectives on the Constitution and Separation of Powers

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Library of Congress Catalog Card Number 90-086309

ISBN: 0-89707-622-2

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ACKNOWLEDGEMENTS

The essays included in this collection are designed to provide educators and other interested individuals with contemporary perspectives on the U.S. Constitution and separation of powers. They are based upon presentations made at the Constitutional Institute for Teachers, conducted by the ABA's Special Committee on Youth Education for Citizenship at American University in Washington, DC in June 1989.

"Separation of powers" refers to one of the enduring principles of the American constitutional system of government, in which governmental powers are subject to a "division of labor" in terms of *function*. It is usually discussed along with its coroilary constitutional principle, checks and balances. In theory, and in practice, the powers of the three branches of the federal government are shared, as well as separated. If this is the case, how *are* lines drawn between the functions of government vested in the legislative, executive, and judicial branches of government? In addressing this question from varying vantages and points of view, the contributors to this collection considered the following specific themes: the origins of the principle of separation of powers, and the relationship between separation of powers and the legislative, executive and judicial functions of government, as well as with respect to the constitutional status of independent federal agencies.

The task of editing this publication was principally the work of Howard Kaplan and Jack Wolowiec, along with Christopher Carey of M & M Editorial Service. Mr. Wolowiec, YEFC's Publications Coordinator, was also responsible for coordinating and overseeing final production.

Essential to this project were the contributions of the 12 authors whose essays appear in this book. The authors are a distinguished group of historians, political scientists, legal scholars, and practitioners. Although she was unable to make her scheduled presentation at the Institute, Prof. Kate Stith of Yale Law School graciously contributed a paper prepared especially for this publication.

Finally, this collection would not have been produced without the financial support contributed through a grant from the Commission on the Bicentennial of the U.S. Constitution (#89-CB-CX-0015), which also supported the 1989 Constitutional Institute for Teachers. Additional funding was provided by the ABA's Fund for Justice and Education.

Howard Kaplan
Project Coordinator
Special Committee on Youth Education
for Citizenship

ORIGINS OF SEPARATION OF POWERS AND MIXED GOVERNMENT

Murray Dry

Recent events in the Soviet Union, Eastern Europe, and China suggest that we may be living in a new age of democratic revolution. At least it's an age of openness, resistance to domination, and aspirations toward freedom. What the freedom-loving Chinese students who erected a "statue of liberty" in Tiananmen Square planned to do next, we may never know. But it is not so far-fetched to suggest that their next task would have been, as it continues to be in Poland and in the Soviet Union, the organizing or reorganizing of governmental institutions with a view toward allowing some amount and form of freedom for the citizenry.

Without suggesting that the only form of true *glasnost* is liberal democracy, we may say the study of some form or another of the doctrine of separation of powers would be helpful for those who wish to redirect their country's policies toward openness and stability.

At the same time, for those of us who think we know all about the separation of powers in its American form, I find a study of the doctrine's founding principles and purposes useful when we reflect on the Iran-*contra* affair and the debate over the right of privacy as applied to abortion. In the first case, we are led to ask what role, if any, Congress has in foreign affairs, and what enforcement mechanisms are available to us. Also, if the criminal prosecution of high-ranking government officials is called for, who should control the prosecutorial function? In the second case, we are required to consider whether the uncertainty over the origins of life means that the people's representatives in the several states should decide on abortion or whether the woman's right to control her body's reproductive organs is so fundamental as to be beyond majority rule.

As different as the situations are in the Soviet Union, Eastern Europe, and China on the one hand, and America on the other, the proponents of openness in the former countries would probably agree with Polybius's contention that founders must first provide for a government which controls the governed, and then it must control itself as well. As the former requires some kind of consent, so the latter depends primarily on the separation of powers.

Political Liberty the Goal

According to Montesquieu, whom the American founders recognized as the oracle on this subject, all nondespotic governments reflect the separation of powers. And those which do so the most fully support political liberty, which he defines as security. In Book Eleven of the *Spirit of the Laws*, Montesquieu identifies the English Constitution as having political liberty as its end, and the separation of powers as the means of securing that end. He then goes on to discuss the Roman Republic as not having fully incorporated the separation of powers. Montesquieu's reference to Polybius's account of Rome reminds us that that oracle of Rome did not describe the Roman Constitution in terms of the separation of powers. Rather, first Polybius and then Cicero described Rome as an example of mixed government -- by which they meant a combination of monarchy, aristocracy, and democracy.

Montesquieu not only favored England over Rome or any other ancient republic, but he also favored the doctrine of the separation of powers over that of mixed government. Why? To understand that, we need to understand the differences between the two doctrines.

The doctrine of the separation of powers starts with a division of governmental tasks. In its American and most common form, it also involves a separation of persons, but this is not essential. The doctrine arose in 17th Century England, in part during the Commonwealth period with the writings of the Levelers, in part with Locke's *Second Treatise*, written to support

the Glorious Revolution of 1688-89. It was then developed by Montesquieu in his *Spirit of the Laws*, written in 1748.

These historical origins suggest the importance of what the doctrine itself suppresses, namely, the difference between republics and monarchies. For example, Locke's formulation was fully compatible with strong monarchical government. For Locke, the three governmental powers were legislative, executive, and federative, federative being identified with war and foreign affairs. When Locke's argument for unifying the sword, which means having a single executive who also controls the federative power, is put together with the executive's absolute veto over legislation, it is no wonder that the executive is described as "in a tolerable sense" supreme. The Levelers had a much more republican formulation, although their written constitution, the instrument of government, bore little relation to the actual Cromwellian regime.

Separation and Blending

There are two ways of describing Locke's relation to the separation of powers. Either he did not follow it because he did not keep the different powers in distinct branches. Or he followed it, and the doctrine as both he and Montesquieu understood it was not limited to separation and division, but also included blending or mixing as well as the use of number, that is a plural legislative body and two houses and a single executive, always in being, both for the sake of checks and balances.

In *Federalist* 47, Madison responded to the anti-federalist charges that the Constitution violated the separation of powers through its blending of powers and the Senate's participation with the executive in appointment and in treaty making. Madison cited Montesquieu to the effect that a partial mixing was permitted, and then he supported the argument with illustrations from both the English Constitution and various state constitutions.

Rather than to distinguish separation of powers from checks and balances, it is more instructive as well as more accurate to note that the doctrine intends to produce some form of check on government power, and that various choices are possible. These choices are possible for two reasons. Not all governmental powers are clearly identifiable by kind within a two- or three-part scheme. Foreign affairs cannot be clearly identified functionally as legislation or execution. And, in addition to the power, the offices or branches in which the powers are lodged can be constructed in different ways by taking account of number.

Montesquieu describes the powers as follows: first the legislative; then the executive with respect to things dependent on the law of nations, and then the executive in regard to matters that depend on the civil law. This resembles Locke's formulation with that second power, the executive in respect to things dependent on the law of nations, being the equivalent of Locke's federative power, foreign affairs and war.

But then Montesquieu explains the powers, modifying his original description of the three powers. The first refers to enacting, amending, or abrogating laws. So far so good. The second refers to making peace or war, sending or receiving ambassadors, establishing public security, and providing against invasions. Establishing public security suggests an internal function as well as an external one. And hence, the third now refers to punishing criminals and determining disputes between individuals.

We now have the legislative, executive, and judicial formulation. Montesquieu goes on to argue for an absolute executive veto and a legislative bicameralism which includes a separate chamber for the nobility, just as Locke did and as England had at the time.

The Americans, of course, republicanized the doctrine by eliminating all hereditary claims on office, and dividing the war power in some nonspecific manner.

I want to make four points about Montesquieu's account of the separation of powers by way of preparing our consideration of mixed government. First, political liberty, understood as security, requires a double consideration of laws with respect to the Constitution and with respect to the subject. Montesquieu treats the former in Book Eleven and the later in Book Twelve. The discussion in the former emphasizes checks and balances. The discussion in Book Twelve focuses on the criminal law where it is restricted to threats to another's security in contrast to religion or the purity of morals generally.

Second, in Book Eleven, Montesquieu identifies the judicial power largely with juries, not with permanent judges. The judicial power thus becomes invisible, he says approvingly.

Third, the people's direct participation in government is limited to these decisions of facts, the jury participation. Otherwise, the people act by their representatives. They have no right to active resolutions such as the people did in ancient republics.

Finally, since the end of such a government is security, rather than dominion or war, as was identified with Rome and Sparta respectively, we may wonder whether the older doctrine of mixed government served a different purpose from the new one of the separation of powers.

Aristotle's View

Let us turn to mixed government. Since Polybius followed Aristotle, I must start with Aristotle also, who divided the forms of government by number -- one, few, and many -- and then by purpose -- for the common good or for the good of the rulers only. Then the qualitative considerations of wealth, poverty, and virtue became prominent in Aristotle's treatment. There were good and bad forms of one-man rule, monarchy and tyranny respectively, and good and bad forms of the rule of the few, aristocracy and oligarchy.

For the rule of the many, democracy was classified as defective because it was characterized by rule of the many who were poor and who did not respect the rights of the few who were rich. Aristotle called the good or moderate rule of the many by the generic name for regimes, *politea* -- we might say polity -- but it turned out to be a mixture of democracy and oligarchy.

This scheme was connected to the parts of the government as follows: Rather than legislative, executive and judicial, Aristotle distinguished between, first, deliberation concerning common affairs of the city; second, the ruling action of magistrates, and third, the adjudication of judges. The difference concerns the treatment of the first two. The first two parts are not coordinate, as are legislation and execution. Deliberation is not limited to general determinations, which are characteristic of legislation, and there is no such thing as magistration. Put differently, legislation as a concept leaves out important governmental tasks such as those concerning foreign affairs, which involve deliberation. Consequently, while execution is conceptually subordinate to legislation, the executive can be construed as in a tolerable sense supreme.

Aristotle's deliberative function seems to be something that magistrates would also have to do, so what is the difference? From Aristotle's discussion of citizenship as participation in office or the right to participate, it seems that the deliberative part concerns popular deliberations on common matters, and is found in regimes that are democratic entirely or in part. The more oligarchic the regime, the less common deliberation occurs. That is, the more is in the hands of the few who tend to be rich, the less common deliberation occurs and the more government is done by magistrates. The mixed regime would involve some task for the people to deliberate on and other tasks for the magistrates who might be judged after their term of office by the people.

Good and Bad Rule of Many

How does this work in Polybius's account of the mixed regime, and how does he apply it to Rome? First, Polybius' scheme of regimes follows Aristotle, except that he identifies democracy with reverence for the gods, honor to parents, and respect for elders, and hence he calls it the good form of the rule of the many, in contrast to the bad form which he calls mob rule.

Second, Polybius provides an account of the transformation of regimes, from the good form of one man rule, monarchy, to the bad form, tyranny; back to the good form of rule of the few, aristocracy, to the bad form, oligarchy; then democracy back to mob rule.

Then he describes the Roman republic as a mixture of each of the three single forms of good government. The parts making the mixture possible are the two consuls, the Senate and the people. There was some very limited debate in the federal convention on precisely this point. The founders, except for George Mason and Edmund Randolph, had no difficulty establishing a more monarchical form of rule within the republican government than the

Romans were willing to accept. The consuls control the preparation and conduct of war completely. They control public affairs at home during peacetime. They also summon popular assemblies, introduce measures for the people to vote on, and execute popular decrees. The Senate controls the treasury, both revenues and expenditures. Crimes committed in Italy come under its jurisdiction, as do individual arbitrations. It also dispatches embassies outside Italy for settling differences or offering advice or for the purpose of declaring war.

During the absence of the consuls, Polybius says, it seemed as if the Senate ruled, but the people alone have the right to confer honors and inflict punishment, "The only bonds by which kingdoms and states, and, in a word, human communities are held together."

Moreover, the people have the right to approve or reject laws, deliberate on the question of war and peace, and ratify all alliances and peace treaties.

According to Polybius, this made it possible for each party to cooperate with or counteract the other. While it accounts for greater stability than either of the simple forms, Polybius does not categorically assert that the mixture will stop the cycle of decay and provide for a permanent government. Perhaps that is why Montesquieu criticized Rome as he did, although we would have to consider the criticism both from the perspective of the Constitution and the individual. With respect to the former, the people had a direct share in deliberation, which included not only legislation but war and foreign affairs. Representation as an alternative to direct government is therefore an essential part of the doctrine of separation of powers since that doctrine, understood in terms of its purpose, security for the individual, requires the removal of the people from a direct share in government. The only exception concerns the judicial power understood in terms of juries -- witness the Oliver North case.

Limiting People's Jurisdiction

Still, Montesquieu's discussion of this power under the Roman Constitution suggests that he favored limitations on popular judgments in the most serious capital cases. The limitations introduced by the Twelve Tables effected a balance between the nobles and the plebs. In addition, Montesquieu's discussion of the proper limits of the criminal law would seem to imply that the people's share in the judicial power should be limited by limiting the criminal causes altogether, that is by taking religious and moral concerns out of the people's jurisdiction.

The differences between the doctrine of separation of powers and the older doctrine of mixed government reflect a shift away from a class-based division of political life, toward an abstract functional division, and that abstract division deliberately hides the class conflict as well as the conflict between monarchy and republican government.

Furthermore, the older formulation viewed the people as a part of the entire community, not the whole community. At the same time, it granted the people important direct governmental tasks.

The new doctrine starts from a foundation of natural equality, according to which just government is derived from the consent of the people in their entirety. The people is now all, not just a part. At the same time Madison could, following Montesquieu, celebrate the perfection of republican government in terms of the perfection of representation, which meant the removal of the people in their collective capacity from the administration of government. That's in *Federalist* 63 when he talks about and defends this long term for the Senate. This could only work, I suggest, if the end of political life is viewed not as dominion or war, each of which required an active and public-spirited people, but as political liberty understood as security.

Modern republicanism, rightly understood, looks up to liberalism, the doctrine of individual rights, including the right to be secure and to be left alone. If we note with admiration the public-spiritedness of freedom-loving peoples in the Soviet Union, Eastern Europe, and China today, we might wonder whether the spirit of liberty is fully captured by the modern doctrine of separation of powers, with its emphasis on security.

THE SEPARATION OF POWERS IN COLONIAL AND EARLY NATIONAL EXPERIENCE

Donald S. Lutz

I would like to supplement Professor Dry's analysis by starting with what what has been called a pure theory of the separation of powers. If we had a political system which had separation of powers in a perfect sense, what would be the defining characteristics? We learn them from M.J.C. Vile, a British political philosopher who echoes Montesquieu. He says, first of all, government will be divided into three branches. Second, each branch would have a distinctive identifiable function. Third, each branch is confined to its own function and does not encroach on the function of another. Fourth, the persons composing these three branches are kept separate and distinct, that is to say, you could not hold an office in two of those three branches. And fifth, no branch has sole control of the government.

The United States has never aspired to such a pure separation of powers. But, in a certain sense this becomes a measure we can use, a kind of a template. Professor Dry showed how the idea of a separation of powers developed alongside the theory of mixed government, which in its 18th Century form was referred to as the theory of checks and balances, and how in many instances it's difficult to distinguish one from the other. Both are primary constitutional means for limiting and controlling governmental powers, but in different ways. Separation of powers is essentially concerned with the preservation of liberty, whereas checks and balances as a constitutional theory is primarily concerned with ensuring the inclusion of all relevant groups, social groups, economic groups, and decision making.

Practice Before Theory

The American constitutional tradition not only blends these two principles but hitches them to another theory, one of factional balance, developed by David Hume. How this blending occurred, the form that the synthesis took, and the implications of the blend are going to require some recollection of American history as background. One of the hallmarks of American political theory is that its relationship to political practice is much the way anthropologists describe the relationship of myth to ritual. The practice or ritual comes first, then follows myth or theory.

Beginning as early as 1620, with the Mayflower Compact, those English-speaking people who inhabited North American shores selectively appropriated European ideas to help solve their practical political problems. But American needs were different from those in Europe, and so the European ideas took on new meaning. For example, in America we used the same requirements for voting that they used in Britain. We had to own enough property to earn 40 shillings rent per year. In Britain that enfranchised at most 6 percent of white adult males. The same requirement in America enfranchised at least 50 percent and in many areas over 80 percent of white adult males. Such changes happened often when European ideas were adapted to the American environment.

One consequence of this adaptation was the development in American practice of what we now call popular sovereignty. The British still do not understand popular sovereignty because in Britain they use something called parliamentary sovereignty. They're a democracy with a different philosophical grounding. However, the people in Colonial America didn't sit down and work out a theory of popular sovereignty. They developed institutions which produced *de facto* popular sovereignty. At some point in their history, they began to appropriate theories from Europe which would undergird and justify what they were already doing.

Another difference that developed was that popular sovereignty came to be expressed through a legislature elected by the widest electorate up to that point in history. That legislature was kept close to popular will through frequent elections and clearly established rules of operation. There was also in

America a strong sense of localism in which local majorities were the basis for government and colony-wide government was built up from multiple local governments based upon what we now know as federalism. And the Americans developed a written constitution, starting more than a century before writing the Declaration of Independence.

Politics in Colonial America

America accomplished all of this before there were theories to justify it. The propositions in John Locke's *Second Treatise* were embodied in American colonial institutions even before Locke was born. We can say some of the same things for others like Montesquieu and, to a certain extent, Hume. Furthermore, much what the Americans were doing would never become part of any European system, including Britain's. In America, direct experience in solving practical political problems was more important than political theory.

A key example is separation of powers. Colonial politics in America essentially was a struggle between a popularly elected legislature and a governor appointed by the crown. The legislatures elected by the colonists had control of the purse, but the executive had one important power, the ability to appoint people to paying positions within the executive branch. In England, the crown used this power of appointment to selectively corrupt members of the legislature by giving them high-paying jobs and thus undercutting their loyalty to the legislature. The governors in the colonies attempted to do the same thing, but every colony's legislature prohibited its members from holding any appointive office given by the crown or its representative, the governor. This was known as a prohibition on multiple office holding. They called this separation of powers. In 1787 that is essentially all it meant to most Americans, including those who were at the Constitutional Convention. This notion that one cannot hold an office in two different branches was neither based upon a theory of separation of powers nor commensurate with any theory.

Of the first eighteen state constitutions written between 1776 and 1784, this prohibition on multiple office holding was clearly enunciated in two-thirds of them. It is important to note, however, that even the two states with the strongest prohibition of multiple office holding, and the cleanest, clearest, most insistent statement of the separation of powers, Virginia and Pennsylvannia, in fact did not have separation of powers beyond the prohibition on multiple office holding.

Limits on Governors

If we look at these first eighteen state constitutions, there are a number of typical patterns. First of all, invariably, the legislature either elected the executive directly or selected the executive from among the top vote receivers. In many states, you could vote for whomever you wanted for governor, and then the three who received the most votes would be placed before the legislature, which would choose one. So, in all but two or three states, the executive was the creature of the legislature. Executives in these early states were largely figureheads with had no significant powers. After all, the governor had been the enemy for over a century in America; there was no inclination to arm him with power.

Only gradually did a few states even give the governor a veto. Furthermore, again with few exceptions, not only did the governor have to obtain Senate approval for appointments, but he had a small council drawn from the legislature which advised him about everything. The governor could not act without majority consent of the council.

The courts were taken away from the executive branch and placed under the legislature. The legislature became the highest body for judicial appeal, even in the states that had clear statements of separation of powers.

American Experience and the British Constitution

When the founders assembled in Philadelphia in 1787 they had a lot of disagreements, but there were two things that they all seemed to agree upon. First of all, as much as possible, they wanted to produce a system based upon their own American experience. Second, they agreed that they ought to preserve or borrow that in the British Constitution which was best and worth keeping.

When you read the debates of the Constitutional Convention, there are two categories of issues.

The delegates disagreed over what our experiences taught us living under our own constitutions and over what the British Constitution was really like. There were three major contending positions or interpretations of the British Constitution. One was taken from Montesquieu, one from Blackstone, and one from Hume.

The founders were very familiar with Montesquieu's theory, which interpreted the British Constitution as being one of separation of powers. However, Montesquieu was deeply erroneous in his analysis of Britain. And his notion of what the separation of powers should entail was considerably at odds with American experience as summarized in those state constitutions.

Blackstone's theory of checks and balances was also well known by the founders. But he too erred in his analysis of the British system. And he emphasized a balance among the institutions, whereas in America, at the state level, the checks were all used by the legislature to keep control of the other two branches. Rather than being a means of balance, it was a means of control to produce legislative dominance. Also, the theory of checks and balances was based upon the notion of balancing classes, but there was no aristocracy in America.

Hume's analysis of Britain was the most accurate, but it emphasized the utility of factions based upon the balance of interests. One problem was that he saw this balance of factions as arising and operating outside of the formal legal institutional structure, and certainly outside of any constitutional design. And Americans had long emphasized the importance of virtue in politics, but since political virtues to them meant seeking the common good, a system based upon interest would elevate political corruption above virtue.

The American Synthesis

The American synthesis, the combination created by the founders, moved separation of powers closer to its pure form by clearly distinguishing the three branches. Essentially, the first sentence of each of the three first articles of the Constitution, taken together, do this. They separate these functions. More importantly, perhaps, people were given a means of election other than by the legislature. That is to say, the president would be elected by somebody other than the legislature. The Supreme Court was moved to an independent status. This, by the way, is one of the truly innovative aspects of American politics. There had not been an independent judiciary since it had been suggested by Plato. It was made the highest appellate court and given life tenure.

Furthermore, the checks used at the state level by the legislature, primarily to keep track of the others, were loosened. The other two branches were given counterchecks. And so, for example, even though judicial review is not in the Constitution and is not strictly speaking a constitutional check, it was understood by many that it would probably occur. The president was given a veto, which is a means of check. But, of course, Congress has the countercheck to trump. There is the impeachment process. Congress still retains the dominant set of checks. But the loosening of those checks allowed the system at the national level to move closer to a real separation of powers, although far from a pure separation.

I think that the American hybrid which we call separation of powers is a misnomer. What we should tell our students is that separation of powers means separation of functions plus shared powers. That formulation captures that blending of the true separation of powers and this notion of mixed government, or checks and balances.

ORIGINS OF SEPARATION OF POWERS AND THE JUDICIARY

James R. Stoner, Jr.

Like an aging celebrity, say a baseball player or a movie star, the doctrine of the separation of powers seems today to be not forgotten or even uncelebrated, but, with all due respect, somewhat past its prime. I do not mean to join the chorus of those who think the doctrine outmoded and who would reform the present structure of federal institutions according to the parliamentary model. That opinion has been around for at least a century, although it has more or less passed out of fashion among political scientists who used to be its chief promoters. Still, if the prevailing, not unhealthy climate of skepticism about constitutional reform makes it unlikely that our structure of separate powers will be replaced in the near future, the doctrine of separation of powers seems rather an institutional fact than a living principle. Who today, at least outside the classroom, would say with James Madison that "no political truth is certainly of greater intrinsic value or stamped with the authority of more enlightened patrons of liberty than this invaluable precept of science or politics through separation of powers."

Let me mention three aspects of this contemporary eclipse of the doctrine of separation of powers, at the risk of some repetition. First, there are the great events of our day that promise or portend transformation of states and governments through democratization in the Soviet Union, Central Europe, maybe Latin American, and maybe even China. Second, there is the further integration of the European Community that goes under the name 1992. And then third, there is the rise and return of global issues, particularly environmental concerns, and the consequent pressure for cross-national policy. Among these events, much is said about political doctrines such as accountability and free elections, economic and social liberties, the rule of law, and federalism. But rarely to my knowledge is the separation of powers ever held up as a measure of progress or a maxim of liberty. It seems irrelevant to these grand projects or at most a technical matter of secondary importance or something delayed. Second, in the organizations or corporations in which we spend most of our active life, there is great differentiation of function or division of labor, but there is little that one could possibly call a separation of powers. Rather the corporate model, typically enough, exhibits a bureaucratic hierarchy capped by a chief executive. Its prestigious positions are managerial, a fact not lost upon students choosing careers or, dare I say, teachers considering a switch. In recent years, a model of the business corporation seems increasingly to influence patterns of governance in other organizations, such as schools and universities, voluntary associations, not to mention government itself. When alternatives are proposed, they typically appeal for work place democracy or for more consensual styles of management. But again, in these matters,the doctrine of the separation of powers is considered altogether out of place.

The third aspect shows not in a total eclipse of the separation of powers, but rather what I call its faded light. Undeniably American government is divided among a great number of institutions, so in our day-to-day description of its activities, the fiction of a single entity with a settled purpose rarely appears. Most public deeds are described as clashes of interests or ambitions, as struggles among individuals or groups attempting to influence public policy to their advantage. To the seasoned observer or the trained political scientist, this constant clash of wills is part of what we call the policy-making process. To the participants, however, it must be a source of constant frustration, if occasional, but temporary, triumph. It's acknowledged by almost all as a second-best arrangement, accepted by the practical voice of experience, but hardly praised as a noble ideal. Again, if the separation of powers is seen as a cause of this chaotic process, it earns at most a grudging acquiescence, not pride of place.

The Judicial Power

Now as anyone who remembers *Federalist* 51 will immediately recognize, the attitude just expressed is not entirely foreign to the political thought of the founding fathers. Madison in that paper had described the separation of powers as a way of contriving the interior structure of the government so that interest and ambition might supply the defect of better motives. Ambition must be made to counteract ambition, he wrote, since men aren't angels and angels won't govern.

Moreover, as William Crystal has recently argued, Madison himself rather invokes than explains the separation of powers in the *Federalist*, even though he acknowledges that it has often been misunderstood. This suggests that the obscurity of the doctrine is nothing new to our enlightened time.

If the life of celebrated doctrines is not bounded by threescore and ten, and if their bloom does not expire with their youth, then the study of the origins of the separation of powers may have something to contribute to our understanding of politics in government today. This is the spirit that informs the following remarks on the separation of powers and the judiciary.

The judicial power, of course, is one of the three major powers of government according to the Constitution. Like the executive power, and unlike the legislative, its particulars are not exhaustively enumerated. But one can glean from the specification of the jurisdiction given federal courts that their task is to decide certain cases and controversies brought before them by eligible parties. In textbook accounts of the separation of powers, which typically define the doctrine simply as a system of checks and balances, the judiciary figures for its power of judicial review, that is, the power to declare void acts of the legislature and the executive which it finds to violate the Constitution.

The problem with such accounts is that this power to vindicate the written Constitution is not itself written in the document. Indeed, when Madison justifies the separation of powers for the devices it supplies to pit interest and ambition against interest and ambition, he gives no example of a judicial check and even hints that the judiciary does not quite fit the theory.

To explore the relation of the judiciary to the separation of powers is to see the inadequacy of the textbook theory and perhaps of the account of the *Federalist* itself. From the standpoint of the history of political theory, note that the basic forms and practices of courts as Americans established them antedated by far the theory of the separation of powers itself.

Common-Law Heritage

The theory is generally thought to have first appeared in the mid-17th century and from the point of view of the *Federalist* it received its mature formulation in Montesquieu's *Spirit of the Laws*, published in 1748. As becomes plain in the *Federalist* and is clear enough from Madison's notes on the Philadelphia Convention, the framers took for granted that the judicial power would proceed according to the long-established process inherited from English common law. Precedents would have the force of law, trial by jury would be preserved, and the basic forms of adversary process would be maintained, lest what was taken for granted might someday be forgotten. The anti-federalists proposed, and the Federalists accepted, several amendments to the Constitution -- in particular, what became the Fourth through Eighth Amendments in the Bill of Rights -- that wrote down specific rights of common law. When the framers established a federal judiciary, in other words, they did not create from scratch, but adopted in many respects a well-established institution and one whose antecedents long preceded the doctrine that divided power into legislative, executive and judicial parts.

A second point worth noting about the common-law judiciary is that it arose in the context of a monarchy and not a republic. The same might be said of the doctrine of separation of powers itself, which has been interpreted as a way of republicanizing monarchical institutions or, alternatively, as a framework by which the opposition between monarchy and republic could be transcended if not hidden.

Still, a common-law judiciary, especially at the federal level, bears some marks of its monarchical origins, for instance in the life tenure granted to its members and their selection from the ranks of a profession or guild, and, perhaps most trivially, in their official dress, the robes. Obviously, the

necessity for confirmation at the federal level and the usual recourse to some sort of electoral responsibility in the states republicanizes the judicial power, and again perhaps trivially so does the abandonment of the judicial wig.

Moreover the jury, in many ways the distinctive institution of the common law, is a republican form of institution although it arose under the English monarchy. One is tempted to suggest that the power of judging is like an army or a postal system, more or less independent of the government. But then, it's strange that the judicial power should be made a principal branch of the American regime, not a subordinate institution like the two just named.

Dependent Judicial Power

This leads to a third point about the peculiarity of the judicial power in relation to the origin of the separation of powers. The doctrine is generally held to have been formulated to distinguish the legislative and executive powers, or, in English terms, to adjust relations between Parliament and king, with the judiciary generally treated as a subordinate part of the executive. This view finds its classic expression in the political thought of John Locke, whose doctrine of separation of powers includes the legislative, the executive, and the federative. On this account the separation of powers was a device to ensure the rule of law, understood as ensuring that governance was by general and prescriptive rules, by giving one branch the exclusive power to make such rules, while giving someone else the task of applying the rules to particular cases. The exercise of arbitrary power over individuals was thought to be preventive.

Locke's own account is more subtle than the summary indicates. In particular, through his doctrine of prerogative, the executive is allowed power to act independently of rules in circumstances where the public good necessitates. Still, neither Locke's doctrine nor the simplified version of it has a place for an independent judicial power, especially one with access to sources of law such as precedent and ancient custom, that do not easily fit the model of laws as general and prescriptive rules.

Montesquieu and the Framers

By all accounts, the power of judging earns its coordinate status in relation to the legislative and executive powers in the political theory of Montesquieu, and in particular in the chapter of his *Spirit of the Laws* on the Constitution of England. Several things about Montesquieu's account are worth note, especially as they relate to the adoption of this doctrine by the framers of the Constitution. First, and perhaps less significantly, Montesquieu consistently speaks about the power of judging, not the judicial power.

Second, and quite significantly, he locates the power of judgment according to the English Constitution in juries rather than in judges. In his view, the English judge is a mere mouthpiece for the letter of the law, unable to render judgment according to its spirit. Elsewhere in the *Spirit of the Laws*, an informed and intelligent judiciary is mentioned and praised, namely, the judiciary of a monarchy such as the one he belonged to in France. England, according to Montesquieu, was a republic in the guise of a monarchy. Throughout his work, but especially in Book Eleven, Montesquieu stresses the importance of the sound placement of the power of judging and the importance of a sound judicial process in the security of individual liberty.

In short, Montesquieu praises the separation of the power of judging from the legislative and executive powers, and he praises the development of an independent judiciary that can serve as a depository of the laws, but he treats these as two different matters. Orthodox British doctrine as registered by Blackstone adheres to the placement of the judiciary within the executive albeit with special guarantees of independence through tenure and good behavior.

It was left to the American framers to fuse together the two limbs of Montesquieu's treatment of the judicial matters. An independent and highly sophisticated judiciary, operating to be sure by jury trial, would be considered an independent and separate branch.

Federal Judiciary Brand New

My fourth observation about the particularity of the judiciary in the scheme of separation of powers is that the judiciary is the youngest of the major branches of our government, even if its forms and practices, not to mention its present incumbents, are in some respects most ancient. The new Congress was organized on March 4, 1789. The first president was inaugurated on April 30 of the same year, but the Supreme Court was not formed for a year or two after that. Moreover, though reorganized, Congress could trace its pedigree back through the period of the Articles of Confederation to the several Continental Congresses. The presidency was new, though there had been an executive committee under the Articles, and Washington had been commander-in-chief during the Revolution and had chaired the convention that designed the new office almost as if he were sitting for the portrait that his fellow delegates in writing Article II were drawing.

But the federal judiciary was brand new. What made the delay in the establishment of the federal judiciary possible, of course, was that the judiciaries were firmly established in several states. Indeed, the ability of state courts to recognize and apply federal law in their proceedings made it a matter of no small controversy whether a federal judiciary ought to be established at all.

The Constitution hedged this point. It established only the Supreme Court, leaving to Congress not only discretion over the Court's size and jurisdiction, but discretion over whether to establish other federal courts or to entrust the ordinary application of federal law to the state judiciaries. The First Congress, it turned out, immediately passed a judiciary act and established federal district courts, but the federal judiciary remains in some ways with a peculiar relation to its counterparts in the states for which there's no real parallel with the legislative or executive powers.

SEPARATION OF POWERS, JUDICIAL LAW MAKING, AND THE PRESERVATION OF FREEDOM

Robert Peck

The question I will address is "Does the principle of separation of powers prevent judges from making law?" My answer is both yes and no. This may not seem like a very satisfactory answer.

It reminds me of a story of a teacher from New York City early in the century who wanted to escape the chaos and craziness that the city school system was in even then. He took Horace Greeley's advice and headed west, arriving in a small Kansas town where they were searching for a schoolmaster. He applied for the job, went to the schoolhouse and was subjected to an immediate interview by five farmers who constituted what passed for a school board. He smiled at the earthy, raw-boned men surrounding him, felt a little self-conscious in his fancy city clothes, and asked if he could answer any questions about his teaching methods.

One farmer looked at him sternly, rested a foot on the chair and asked, "Do you teach that the world is round or that it is flat?" The teacher looked searchingly into the eyes of the farmers standing around him. Their eyes gave no clue as to what they thought was the correct answer. Finally, he hiked up his pants and answered serenely, "I'm a very skilled teacher. I can teach it flat or I can teach it round. Which do you prefer?"

The issue of separation of powers can also be taught flat or round. It can be taught as the immutable cornerstone of our governmental system, a bulwark that helps make the Constitution work. Or it can be taught as an element in a system more properly described as shared powers, overlapping and without clear lines of demarcation.

We're taught from the very earliest age the division of responsibilities in our tripartite system of government. Congress makes the laws, the executive administers the laws, and the judiciary interprets the laws. As students, we repeat this mantra until it becomes difficult to imagine how any other division makes sense. The problem is that these phrases are not very useful in describing our system or how it works. Governing is a complex and subtle process not easily given to simplistic and reductionist sloganeering.

We know that Congress does more than legislate. It has substantial oversight responsibilities that amount to administration. Impeachment and the legislature's so-called ethics process are judge-like responsibilities. Furthermore, in passing new laws, a Congress that fails to interpret the Constitution to determine the validity of the proposed law, that fails to interpret existing laws before writing new ones, is actually abdicating its responsibilities.

Similarly, the president both legislates and judges. The executive branch promulgates regulations that run thousands and thousands of pages. No one would deny that this is law, and it is law that goes far beyond the requirements set by statutes. Also, as with Congress, the president who proposes government policy in a vacuum without construing both the Constitution and the United States Code is failing to discharge faithfully the oath of office.

It is perhaps little wonder then that judges also legislate. Do you think obscenity should be protected by the First Amendment? Should laws be declared unconstitutional if they prevent minors from having access to certain kinds of movies and magazines? Those who say no agree with judges who have in essence amended the Constitution by judicial fiat.

Justice Hugo Black was fond of pulling a dog-eared copy of the Constitution out of his back pocket and reading the words of the First Amendment: "Congress shall make no law abridging the freedom of speech or of the press." He would tell his audience, "Now, I read no law to mean no law."

But the Supreme Court has read "no law" to embrace a number of exceptions, obscenity

being one of them, and time, place, and manner restrictions another. These results, of course, are not judicial legislation, but actually amending the Constitution by judicial decision. The president's power to enter into executive agreements or issue executive orders, and Congress' considerable power to probe, issuing subpoenaes to testify and punishing falsehoods with contempt actions are also constructions of the Constitution that can be said to be made of whole cloth.

Interpretation Not Mechanical

How and why does this happen? Interpreting the law, whether it is a statute or the Constitution, is not a mechanical task. In some cases the law is clear. Article I, Section 7, of the Constitution begins, "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." Whatever the wisdom of this procedure, whatever the minimal practical differences are between allowing a tax bill to begin in the Senate rather than the House, a judge construing this provision must declare that the House is the only constitutional venue for the origination of such a bill.

But few areas of constitutional concern are as unambiguous. Words like "freedom," "liberty," "due process," and "equal protection" are not self-defining. To be enforceable, they must be defined in a practical way or else they are meaningless. Rarely do the political branches, Congress and the presidency, provide the necessary meaning. And even when they do, as in much of modern civil-rights legislation, new ambiguities and unanticipated applications raise new issues that find their ways into the courts and cannot await the slow and uncertain process of legislative solution. As is the case in nature, Congress and the government in general abhor a vacuum. A vacuum happens when the political branches fail to act, as they're apt to do when the issue requires them to make a statesmanlike stand over political expediency. Or when it requires them to devise a complex response that is more involved than the president or the Congress or the states are prepared to make.

When they abdicate these responsibilities, it falls to the courts to respond, and it is appropriate that they do so. Judges thus legislate by trying to make a sensible application of the law. The results are not always salutary, but more often than not it results in the gratification of rights enforced.

Not Only Source of Fundamental Law

Thus in 1937, when the concept of ordered liberty was propounded by the Supreme Court, an expansive view was adopted of what the Bill of Rights as a whole was attempting to accomplish. Individually the amendments and perhaps even the language did not necessarily embrace this expansive view. But they did not prohibit it either. It was the decision of the Court, looking at a long line of decades-old governmental abuses of rights that we take as fundamental. But the whole was greater than the sum of its parts. Nonetheless, in the act of construction, this was judicial legislation of a constitutional variety.

What is often misunderstood is that the written Constitution provides the framework, but is not the sole source, of our fundamental law. We, of course, look to the Constitution's text. But because live questions are rarely settled by that alone, we also look to natural law, common law, precedent, custom, enacted law, and--despite the characterization of the law by Dickens' Mr. Bumble--we also look to reason.

One of our most important constitutional precedents exemplifies this approach, *Marbury v. Madison*. *Marbury* is most frequently cited as the foundation of the concept of judicial review. William Marbury had been one of the midnight appointments of John Adams to the position of justice of peace. His appointment was issued on the eve of Thomas Jefferson's inauguration. It had not been delivered. Jefferson ordered his secretary of state, James Madison, to withhold the undelivered last-minute commissions, including Marbury's. Marbury and several others sued for a writ of mandamus to compel the delivery of the commission.

In the decision, Chief Justice John Marshall set up three questions that he had to answer. One, did Marbury have the right to the commission? The Court decided he did. Two, was there a remedy in court for the wrongful denial of a commission? When Marshall declared that for every right there exists a remedy, he was legislating, relying on principles of natural law

and Blackstone's *Commentaries* for support. He called the power to order a remedy to a violative right the very essence of civil liberty, echoing Alexander Hamilton in the *Federalist Papers* who wrote that "laws are a dead letter without courts to expound their true meaning and operation." Finally, they arrived at question three: was a writ of mandamus before the Supreme Court as provided in the Judiciary Act the proper remedy? No, the Court declared. It was beyond the authority of Congress to assign that responsibility to the Supreme Court because only the Constitution could set the Court's original jurisdiction.

Thus, the Court came up with a remedy to a constitutional violation, the violation being the enactment of that particular provision of the Judiciary Act, and it annulled that provision of the Judiciary Act that conflicted with the Constitution.

Today we are used to courts using that power of judicial review, but this was the first time the Court rescinded a law passed by Congress and signed by the president. This was a very legislative act by the Court. This was also an action taken in remedy of a constitutional violation. The Court did not have to annul the act itself. It could have chosen to issue a directive to Congress to repair the constitutional violation. However, in exercising its remedial powers in equity, the Court acted in declaring the provision null.

Violations Impel Courts to Act

It is in exercising its remedial powers that the courts have most acted like legislatures, and sometimes like executives. The exclusionary rule and the higher scrutiny used in equal-protection analysis for fundamental rights and suspect classes are examples of remedial powers at work. Courts have remedied legal and constitutional violations by taking over the administration of the schools, prisons, public housing projects, and mass transit systems, just to name a few. Though courts are not naturally adept at these tasks, the legal violations of the authorities necessitated it.

In 1979 I brought a lawsuit against the New York State Department of Education and the New York City Board of Education on behalf of 53,000 handicapped children. Claiming rights derived from the Fourteenth Amendment and the Education of All Handicapped Children Act of 1974, along with complementary state, constitutional, and statutory provisions, we asserted that the state and city were violating the rights of these young people by putting them on waiting lists to get into classes. The children in this case ranged from those with minimal physical handicaps to those with extraordinary physical and mental conditions. Yet, every one of them had a right to participate in the public educational system in line with their needs and abilities. New York's answer to them had been, "We cannot afford to educate you at this time."

The case was filed in February and by April we had a judgment in our favor. The court then offered the defendants a chance to draft an order remedying the violations. The order that they offered, drafted by the New York City school system, was, "We'll try harder." As you can imagine, this was not a satisfactory answer to us or to our clients.

Instead the court asked us to draft the order. It specifically told the New York City Board of Education to begin and complete testing procedures within specific periods of time, to mainstream appropriate students, to hire sufficient teachers, to place all these students in educational programs. The court ordered that remedy in December. The remedy was very intrusive. It involved the allocation of tax dollars. Thus, it also can be considered a legislative act.

It was also a necessary response to the school system, which was unwilling to remedy the problem itself. As opposing counsel told me, "The school authorities agree with what you're asking for, but politically they can't ask for it themselves. They need to be ordered to do it."

The case made the front pages of the New York papers, and what we discovered then was that while the waiting list of handicapped children to get into school numbered 53,000, a further 40,000 children had not bothered to put their names on the list, knowing that the situation was hopeless. With this announcement of the court order, they now came forth. The following September, the waiting list was 85,000. That's what happens when you have a school system that has a million students.

The school system had failed to comply with the court order's deadlines and had failed to recruit very many special education teachers. What had they done? Well, they placed a few ads in *The New York Times'* classified section, but not any of the display ads that normally appear in the education employment section. They had not asked for a waiver of certain bureaucratic procedures slowing the process, and they had failed to establish the evaluation system they claimed would alleviate the backlog in evaluating student needs.

We went back to court with what became our annual motion for contempt. The city's reticence to do what was necessary to comply with court orders forced us to ask the court to take discretion away from the school system. The court agreed. As a result, we, the lawyers for the plaintiffs and the court, ended up designing recruitment ads, placing them in appropriate teacher-oriented publications. We set up an alternative evaluation system, though none of us were really expert at that. We had to hire our own experts. We reviewed samples of the placements of students that were made in various schools. At each step the school system had to be dragged kicking and screaming. It so wearied the judge that I suspect he became predisposed to order contempt each time we came back into court.

Breathing Life into Law

This is how we force judges to become legislatures and administrators. Judges are reluctant to take that role. In the landmark case of *Brown v. Board of Education* the court declared that separate but equal was inherently unequal in the field of public education. It ordered desegregation with, using an unfortunately ambiguous phrase, "all deliberate speed." Speed can move with the swiftness of light but those who want to drag their feet can also make it move at an imperceptible pace. Those who were responsible for the racial discrimination chose the latter speed. Busing and a variety of other remedies were eventually ordered to achieve what the court ordered 25 years ago.

It has now transformed our society, though it has not achieved all its goals, not even in Topeka, Kansas, where the *Brown* case originated. On June 2 of this year, the Tenth Circuit Court of Appeals ruled that the Topeka Board of Education still had not sufficiently countered the affects of both the momentum of its pre-*Brown* segregation and subsequent segregative acts in the 1960s. The court found that the school board had practiced benign neglect in carrying out the full mandate of the 1954 decision.

It is for that reason that judges must do more than just interpret the law. They must breathe life into it to make it meaningful and applicable to contemporary America. When they do, the Constitution does not require a frequent amendment but is allowed to speak to fundamental principles--principles like liberty, equality, and justice which require vigilant and active assertion in the face of changing circumstances.

Constitutionalism: Our Defense Against Tyranny

Fundamental questions of power and rights are properly discussed in terms of the Constitution and the courts must have a role in that dialogue. We in the United States take our liberties and our rights for granted. This is a truth easily acknowledged and frequently lamented, yet little is done about it. Perhaps our benign neglect results less from the confidence that our civil liberties can survive any challenge than from a collective inability to imagine the circumstances that would place our long-secure freedoms in jeopardy.

It is not difficult to imagine a society where freedom does not exist. Authoritarian regimes and even some democratic republics commit vicious crimes agains human rights, as newspaper reports indicate every day. In these societies, national survival has made security more important than individual liberty. The terror without makes the terror within tolerable, or at least that is the theory. The state's inexorable drive for survival encourages it to employ tantalizing new technologies to intrude on people's privacy in search of sedition, an indication that government doesn't trust its citizens.

Still, there is another irresistible drive at work here, a desire for liberty, justice, and equality that no regime can ever extinguish. This pang resounds in the souls of thinking individuals who often struggle against long and seemingly

insurmountable odds to sustain a hope that is the source of their power. In the United States the people place their faith in the Constitution. It will protect us, we casually assume, from enemies who would take our liberties away. To us, in our litigious culture, the Constitution has become the legal equivalent of a Star Wars weapon, an armament capable of destroying challenges to our liberties as soon as they are launched.

However, our ultimate line of defense against tyranny, our great legal tradition notwithstanding, is not the Constitution, but the culture that it has helped engender. It is certainly true, as Justice Brandeis wrote, that the greatest menace to freedom is an inert people. The durability of constitutional principles in the United States has been thanks to the activist nature of its people. It is an inbred part of our culture.

This provides a valuable lesson to those who study governing charters. Constitutionalism, often described narrowly as government according to constitutional principles, is actually the development, refinement, and maintenance of a governing culture. A constitution is merely words on paper that can be conspiratorially ignored even by the people as a whole. To try to isolate the courts and the work of judges from that culture is to try something that can never be.

Hamilton referred to the courts as the least dangerous branch because he understood that courts operate within inherent limitations. Courts do no initiate. They entertain cases brought by others. They must decide issues within a justifiable framework. They have no constituency they must satisfy and, thus, have a special responsibility to minority interests and rights. Unlike the political branches, an apathetic public will not give them the opportunity to search constitutional limitations for loopholes that tend to become enlarged over time until the Constitution and the government become two wholly different systems, one merely theoretical, the other real.

Avoiding 'Passions of the Day'

Still, the courts must be cautious in how they operate. They cannot become involved in controversies that are purely political. If they do, they are certain to come out the loser. They have no powerful constituency to protect them. They command no armies. Instead they must rely on the logic and force of their opinions. As Supreme Court Justice Felix Frankfurter once said, "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures." That is why we value wise judges capable of vindicating legally enforceable rights while demurring on questions of policy that fall outside the legal framework. It is something of a tightrope the judiciary must walk, but we have discovered no other way.

Security or Liberty?

Societies are frequently called upon to make decisions that appear to cost little in terms of liberty in order to achieve great dividends in terms of security. Individually each of these decisions seems to come out favorably for the security interests that are involved, especially when put to a cost-benefit analysis. Cumulatively, however, these decisions contain the strong possibility that imperceptibly the government will have turned the corner that places it in the category akin to authoritarianism.

When that happens little by little, it's virtually impossible to detect the precise moment or decision that crosses the line or to guard against that eventuality. In words ever more true today than when first written, Alexis de Tocqueville observed more than 150 years ago that if the lights that guide us ever go out, they will fade, little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of principles, and when these have been entirely forgotten we may apply the methods derived from them badly. We might be left without the capacity to invent new methods and only be able to make a clumsy and unintelligent use of wise procedures no longer understood.

We must always be wary of the slippery slope upon which we may tumble toward tyranny. If we don't recognize the direction we are heading, then the judiciary becomes our last line of defense.

A Collection of Basic Values

An enduring constitution is a real collection of a nation's core of values. As those values evolve, so must the constitution's reflection of them evolve. Thus, the values inculcated in a constitution must be basic values, basic ideals. A constitution that is weighted with specifics becomes an administrative document, mere regulations or ordinances, unworthy of a kind of respect we reserve for constitutions.

Furthermore, in a legally oriented culture such as ours, the charter must be capable of elaboration and enforcement by independent courts. Without that they are mere statements, incapable of being followed and impractical in all respects. In those circumstances they become aspirations without a practical means of achieving the carefully delineated goals. When constitutions are statements of fundamental principles, their specific applications, particularly in the future when unforeseen circumstances call them into account, always remain open to debate.

The debate must be joined by the judiciary, who cannot help but act as products of our constitutional culture. The precedents of the past provide interpretative and jurisprudential guideposts against which new disputes must be judged. Sometimes changed circumstances require new and unique applications of the never-changing principles of freedom that the U.S. Constitution seeks to establish. We trust the wisdom of our judiciary to recognize those needs for change. The points at which concurrent but opposing threads of constitutional doctrine are bounced provide the arena for social, political and philosophical debates.

It is at this nexus that the courts have been entrusted to explore the confines of a legally enforceable framework. In doing so, judges must recognize that the constitutional choices they make affect not only present generations, but generations yet to come. They must withstand the pressure of public opinion to make the right decision, not merely the popular one. It is a large task, and one that places enormous responsibility in the judiciary to protect us from our own follies.

Still, it is a system that has worked and survived for 200 years in the United States because of our culture's dedication to freedom. The preservation of freedom, the core value at the heart of the system of separated powers, is the ultimate goal. There's nothing more that one can ask of a judicial system, or for that matter of a constitution.

SEPARATION OF POWERS AND THE POWER OF THE PURSE

Kate Stith

Who writes the federal budget? Who is responsible for federal taxes and federal spending--and for the federal deficit? You probably are thinking, "Congress," and you're right, but only partly right. It is my task to explain the federal budget process, especially as it relates to our Constitution's separation of powers principles.

The United States is truly extraordinary in giving the executive branch--the branch that actually collects the taxes and spends the money--so little formal constitutional authority over making fiscal policy. At the same time, the actual power exercised by the executive branch is much greater than formal constitutional doctrine might suggest.

Fiscal Provisions of the Constitution

Let's begin with the Constitution itself. It gives almost all fiscal power, over both revenues and spending, to the legislative branch. We should be clear as to what that means. The legislative branch is not just the Congress; the president also plays a very important legislative role, because he has the veto power. In a sense, there are *three* legislative "houses." Two of these are in the Congress (the Senate and the House of Representatives); the other is the "White House." In order for a bill to become a law, it must be approved by a majority of each house of Congress *and* by the president. If the president doesn't go along--if he exercises his veto power--then a two-thirds vote of each House of Congress is needed to override his veto.

The president has a great deal of legislative power because he can stop legislation that has less than two-thirds support of each House. Veto overrides don't happen very often.

A Cooperative Effort

Nowhere is the president's legislative power more important than with respect to the federal budget. In recent years, the principal federal budget for each fiscal year has never been passed *without* the president's support. This is why congressional budget leaders work *with* the president in advance of the actual votes in Congress, to hammer out a budget that the president will not veto. Right now, as in most of the years since World War II, we have a Democratic Congress and a Republican president, and we have a budget that has bipartisan support. You always hear the president, whoever he is, complain about the budget. But he signed it. You always hear members of Congress complain about the budget. But chances are, they voted for it.

The Constitution tells us that authority to tax, to borrow, and to spend must come from this legislative process. For ease of reference, I am going to refer to the legislative branch as "Congress"--but don't forget that the president has an important legislative role, too.

Let us first look at the power to raise revenue. Under the Constitution, there are two major ways that the federal government can raise revenue: by taxes and by borrowing. Section 8 of Article I says: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts, and provide for the common Defence and general Welfare of the United States ...." Section 8 also specifically gives Congress power "[t]o borrow Money on the credit of the United States."

This latter provision, permitting borrowing, has assumed great importance. The power to borrow means the power to run budget deficits. This is not to say that federal deficits are good--only that they are permitted by the Constitution.

Besides giving Congress the general power to raise taxes and to borrow money, the Constitution has a few specific provisions about this revenue power. First, Article I, Section 7 provides that all taxation legislation must originate in the house closest to the people--the House of Representatives. That means that the

House committee with jurisdiction over tax bills has a great deal of power. If a tax bill doesn't get out of this committee, it doesn't get passed. The name of the committee is especially apt, the Ways and Means Committee. This was one of the first committees organized by either house of Congress; Elbridge Gerry was asked to "prepare and report" an estimate of the "ways and means" to fund the federal government.

The Income Tax Watershed

There is one other especially important constitutional provision dealing with raising revenue. This is the Sixteenth Amendment, made part of the Constitution in 1913--which gives Congress the power to collect personal income taxes. (An amendment was necessary because, for complicated reasons, the Supreme Court had held that this form of taxation was not included in Congress' general taxing power in Article I).

In the fiscal history of the United States, passage of the Sixteenth Amendment was terribly important. In my view, it is the federal income tax, not the first World War or the New Deal, that marks the beginning of the powerful federal government that we know today because it was the income tax that truly gave the federal government the financial "ways and means" to take on responsibility for feeding and housing the poor, providing for the elderly, subsidizing mortgages, building interstate roads, regulating national research and investment, and building the defense establishment necessary to exercise world power.

The Power to Spend

Raising revenue, whether by borrowing or by excise taxes and import duties or by an income tax, is only half of the fiscal picture. The other half, of course, is spending.

What does the Constitution say about spending? It says, first of all, that the Congress can spend money on just about anything it wants. It gives Congress broad power to spend for the common defense and general welfare. Section 8 of Article I also lists several enumerated legislative powers such as power to regulate interstate commerce, to establish post offices, to issue patents and copyrights, to raise an army. And Section 8 says that Congress (with the president in his legislative capacity) has authority "to make all laws which shall be necessary and proper" to carry out all constitutional powers of the federal government.

There is one final, and especially important, clause of the Constitution dealing with the power to spend. Article I, Section 9, provides that the legislative branch shall control the proverbial pursestrings: "No Money may be drawn from the Treasury, except in Consequence of Appropriations made by Law." This is the Constitution's appropriations clause. By its terms, the appropriations clause prohibits the executive branch of the federal government--from the president on down--from spending public funds except pursuant to congressional appropriations.

Appropriations are a special type of legislation--legislation which explicitly grants *spending authority* to the executive branch. For example, an appropriations statute might provide $500 million for various programs of the Department of the Interior, or provide $2 billion to the Department of Defense for a certain weapons program. Usually, appropriations legislation only provides spending authority. The legislation that actually creates a new federal program or that sets up a federal agency is enacted separately.

Under the appropriations clause of the Constitution, the legislative branch--including both the Congress and the president--is politically and constitutionally responsible for federal spending and, hence, for the federal deficit. In the balance of this paper, I will look more closely at this *appropriations power*. First, let's look at the development of the federal budget process over the last 200 years.

History of Budget Making

The budget process has always been characterized by what political scientists call "fragmentation." It was not until 1842 that Congress adopted the concept of a fiscal year and began to establish an annual timetable for consideration of spending legislation. But the timetable is not written in stone. Congress may at any time during the year enact spending bills or tax bills.

Fragmentation takes other forms as well. Until the Twentieth Century, neither the president

nor the Congress considered spending and taxing in tandem. The separation of revenue legislation and spending legislation predates the founding of the United States; it was the practice also in England and the colonies. For most of our history, different committees have been in charge of spending and taxing. In the House of Representatives, for instance, the Ways and Means Committee writes tax bills, while the Appropriations Committee writes most spending bills.

This uncoordinated budget process was adequate for the needs of the Nineteenth Century. The federal budget usually remained in surplus, except during wartime, because tariff revenues outpaced spending. With the expansion of the federal government's activities early in this century, reform of the budget process became necessary. Amid a proliferation of spending programs, accompanied by new sources of revenue under the Sixteenth Amendment, Congress finally acted in 1921 to establish a comprehensive framework for considering budget legislation.

The 1921 legislation made the president the central player in the budget process. Prior to 1921, few presidents had even participated in budget preparation. Rather, government agencies and departments submitted their budget requests directly to Congress.

Since 1921, the president has had to submit to Congress a complete proposed budget each year, including both tax and spending legislation. The 1921 law also created the Bureau of the Budget within the executive branch (now known as the Office of Management and Budget), thus granting the president a major source of budgetary expertise and power.

Of course, the budget submitted to Congress by the president each year is, constitutionally, simply a proposed bill. Congress always has retained the power to accept all, some, or none of the president's proposed budget. But the 1921 legislation gave the president a leg up, so to speak, by making his proposed budget the starting point, the budget blueprint, from which Congress would pick and choose, adding here, subtracting there.

It was not until 1974, after the crises of Watergate and presidential impoundments of appropriated funds, that Congress sought budget-making responsibility and capability commensurate with that of the president. The 1974 Budget Reform Act created new Budget Committees in each house of Congress to pursue an integrated, systematic approach to federal taxing and spending. The legislation also made it procedurally more difficult to enact new spending programs, and it established the Congressional Budget Office to give Congress analytic budget capabilities more commensurate with that available to the president in the Office of Management and Budget.

Since 1974, I think it is fair to say, the president's budget has been less of a blueprint for federal spending; Congress has taken more initiative to develop its own budget proposals. Again, of course, it must be stressed that the final spending and taxing legislation must be agreed on by Congress *and* the president.

Gramm-Rudman-Hollings

Within a few years after passage of the 1974 budget reform legislation, it became evident that the legislative budget process was not working well. Despite procedural obstacles, spending and the deficit grew. The budget crisis of the 1970s worsened in the early 1980s, when Congress and the president significantly increased federal spending--particularly the defense budget, which had languished in the 1970s--and yet simultaneously cut taxes.

The huge growth in deficit spending suggested that the Congress and the president are institutionally unable to restrain spending in relation to revenues. There were many proposals aimed at "tieing the hands" of both Congress and the president to somehow force deficit reduction. The upshot was enactment in 1985 (and reenactment with modifications in 1987) of the Gramm-Rudman-Hollings budget balancing bill.

Let me hasten to add that "budget balancing" is a misnomer. The budget has not been in balance since passage of Gramm-Rudman, and it will not be balanced in the foreseeable future. But most observers agree that Gramm-Rudman has changed the budget process significantly, making it harder to spend without taxing. The basic mechanism of the law is a fixed deficit ceiling for each year, which will be enforced by automatic spending reductions if Congress and the president fail to abide by the ceiling. As

one observer has explained, Gramm-Rudman is a "timed guillotine" which is supposed to deter the president and Congress from irresponsible spending without taxation.

Several points need to be made about this law. First, although many people talk about Gramm-Rudman's spending cuts being "across the board," in fact they are not across the board. Many spending programs (including Social Security) are entirely exempt from the threat of automatic cuts.

Second, there are all sorts of loopholes in Gramm-Rudman. For instance, it applies only to the original budget each year; Congress and the president may enact "supplemental" spending bills that exceed Gramm-Rudman's deficit ceiling.

Third, Gramm-Rudman is only a statute, not a constitutional amendment. This means that if at any time its demands become too great, Congress and the president can simply pass a law repealing or amending it. In fact, this has already happened. Two years ago, Gramm-Rudman's deficit ceiling required a lot of budget cutting. Rather than reduce the budget, the legislative branch simply amended Gramm-Rudman to raise the ceiling.

Presidential Impoundment

The budget bills passed by Congress and signed by the president are only the first stage in the process of funding federal programs. After the budget bills are enacted, the executive branch of government takes over--the president not in his legislative capacity, but in his executive capacity. Federal spending itself is not a simple or technical exercise. It is a political process, and appropriations legislation usually leaves the executive branch with significant discretion as to exactly where and how appropriations shall be spent. As I see it, there are two very important constitutional questions concerning the extent of the president's spending discretion: first, may the president ever spend less than the amount appropriated by Congress? In the final section of this paper, I will look at the other side of that question: may the president spend more than the amount appropriated?

When the president spends less than the full amount appropriated, this is generally called *impoundment*. Presidents since George Washington have impounded funds in various circumstances, though few of the early impoundments were controversial. Clearly, some kinds of executive impoundments are necessary. For instance, suppose Congress appropriates $2 million for the construction of a particular battleship. If it turns out that the Department of War (or, as it is now called, the Department of Defense) can build the ship for less than $2 million--or if it turns out that the battleship is no longer needed--then there is no reason not to return the excess funds to the United States Treasury--for Congress to appropriate in whatever way it sees fit. Thus, President Jefferson returned an amount appropriated for gunboats after a "favorable and peaceable turn of affairs" made construction of the boats unnecessary.

Under the Nixon administration, presidential impoundment became a very hot political issue. Disagreeing with the policies behind specific social programs, President Nixon sought to terminate some programs outright, even though Congress had appropriated funds for them. There were a series of lawsuits, most of which the president lost in the lower federal courts. Interestingly, however, the Supreme Court never addressed the bottom-line constitutional issue: whether for the routine appropriation, the president has authority to impound, to spend less than Congress has legislated. The most the Supreme Court decided was that when Congress creates a clear entitlement to money--for instance, a city's right to federal financing of its sewage treatment projects--the president must spend this money.

It was Congress itself that resolved the constitutional impoundment crisis, by enacting a new law in 1974--the Impoundment Control Act. This statute permits the president to impound funds, but only with congressional approval. As originally enacted in 1974, the law provided that a proposed presidential impoundment would be effective unless either house of Congress objected. In 1983, however, the Supreme Court held such "legislative vetoes" unconstitutional. Now, the president may undertake a proposed impoundment of funds only after both Houses of Congress enact resolutions agreeing to the impoundment.

I should note that this Impoundment Control Act, limiting the pclaimed impoundment power,

was part of the general congressional budget reform legislation to which I earlier alluded. At the same time, other laws were enacted that sought to limit the power of what one scholar has called "the imperial presidency."

Can the President Spend More?

Let me conclude by discussing the flip side of the impoundment issue: Can the president ever spend *more* than the amount appropriated? This is one of the important constitutional questions raised by what has become known as the Iran-contra affair.

In its appropriations for 1984 and 1985, Congress provided that no monies could be spent on military aid to the Nicaraguan "contras" (the opposition to the Sandinistas who then controlled the government of Nicaragua). This provision was called the "Boland Amendment," named after its congressional sponsor. Despite the Boland Amendment, National Security Council staff in the White House, especially through the efforts of Lt. Col. Oliver North, was able to arrange for millions of dollars in military aid to the contras.

Some of this money had originally been appropriated by Congress for other purposes; much of the remainder was provided by other countries at the suggestion or request of Lt. Col. North and others in the executive branch. This incident raised many important legal issues.

The first legal issue was whether the Boland Amendment, prohibiting efforts to aid the contras, even applied to the National Security Council staff in the White House. Oliver North testified that he didn't think it did, and therefore he was free to try to arrange for such aid.

A second legal issue was whether, if the Boland Amendment did apply to the National Security Council staff, it was unconstitutional. North and President Reagan argued that applying the Boland Amendment's cut-off of funds to the White House itself would constitute interference with the president's inherent foreign affairs powers.

A third legal issue was whether, even if the Boland Amendment applied to the White House, and even if it is constitutional to tell the president not to provide military aid to some group or another, the president still has authority to raise *non-government* funds to aid that group, even without specific legislation authorizing such donations.

A fourth legal issue is whether the president ever has authority to take funds appropriated for one purpose and spend them instead on a different purpose, without specific legislation authorizing such reallocation of appropriations. (Congress thought it had answered this question over a century ago when it enacted the Anti-Deficiency Act, which prohibits moving funds from one account to another without legislative approval.)

I am not going to try to resolve these legal questions here. The Supreme Court has not addressed them; in fact, no court has fully addressed the constitutional issues, though they were raised in the recent criminal prosecution of Oliver North. It is enough for me to note the importance of these disputes.

Most people agree that under the Constitution, the president has some inherent foreign affairs powers--powers to deal with other governments and so forth, even where the legislative branch does not pass a law confirming that power. Most people also agree, however, that it is when dealing with the purse-strings that Congress' power is greatest. We have seen that the Constitution itself provides that no money shall be taken from the Treasury without legislative approval.

One way to state the underlying constitutional issue is as follows: How far can Congress go in denying funds in the foreign affairs area before it invades the president's constitutional powers? Even the strongest proponents of congressional power concede that in some areas, the president's constitutional powers require Congress to appropriate funds. For instance, it would violate at least the spirit of the Constitution for Congress to refuse to appropriate any money for the White House, or for the president to exercise his constitutional power to pardon those convicted of federal crimes, or for the president to greet ambassadors from other countries. These are specific powers that the Constitution grants to the president, and Congress must provide enough money for the president to carry out his constitutional responsibilities.

But, on the other hand, even the strongest proponents of presidential power agree that usually the president cannot raise private funds to spend on government functions and cannot transfer funds from one appropriations account to another unless Congress has enacted legislation expressly authorizing such actions. But what about in the foreign affairs area, where the president has special constitutional authority? Can the president get around an appropriations cut-off (or can he undertake a new initiative for which he does not have legislative support) by going to private parties and third countries for funds, or by using funds Congress has appropriated for other purposes?

Let me leave these questions dangling; I hope at least I have convinced you that your eyes should not glaze over when you hear the words "the federal budget." The power of the purse, the power to spend and to tax, are critical powers in our constitutional democracy.

SEPARATION OF POWERS AND CURRENT RELATIONS BETWEEN CONGRESS AND THE PRESIDENCY

Robert A. Strong

I'd like to offer a very informal account of the current state of relations between the Congress and the presidency. In many ways it is the most important, or at least the most active, of the connections in our system of separation of powers. My account is based on the insights I have learned, such as they are, from working on Capitol Hill during a year of presidential transition and some very interesting events within the Congress.

But first I want to make a few broad comments about the whole problem of separation of powers and why it is very often a difficult subject to deal with. Congress is the most representative of the branches. It ought to have authority over taxation, a rather important subject in American colonial history. The president is a single individual and can, therefore, best be trusted to serve as commander-in-chief of the armed forces and make definitive decisions in emergencies. The court with lifetime tenure is the most independent of the branches and, therefore, the best repository for responsibility in the protection of individual rights.

Very often when we talk about separation of powers we mean the efficient distribution of functions to different organizations having different characteristics. But that's only half the story. The other half is just the opposite. We want powers to overlap. We want lines drawn between our branches of government in a blurred fashion so that no single branch will be capable of abusive power. Now, those very different notions should not lead us to believe that the founders were foolish and didn't notice the contradiction. Quite the opposite. They were extremely sophisticated and subtle in their understanding of human nature and in their perceptions about government and political institutions, and we learn an enormous amount by looking at what they have to say on a whole range of subjects.

Unfortunately, we almost never can find decisive, definitive, and conclusive answers from what they said, given the complexity of their thought and the difficulty of many issues that we encounter. Consider just the problem of war powers. Hamilton and Madison, who both attended the Constitutional Convention, who both worked together on the *Federalist Papers*, found during Washington's administration that they had very different views of that subject. They both appealed to the language of the Constitution, to the principles upon which it was based. We are still having that argument today.

Changing Institutions of Government

So separation of powers is a difficult subject to deal with because it has this complex if not contradictory origin. It's also difficult to deal with because the institutions change. I hesitate to say that they evolve, because that would suggest that they're constantly getting better, and very often we take steps backwards. But, they are changing.

The most obvious example in our lifetime was in the late 1960s and the early 1970s when a lot of concern was expressed about the problem of an imperial presidency, a president who had become far too powerful in foreign affairs. Not long after that, Gerald Ford began to complain about an imperiled president, a presidency that had become by the mid-1970s far too hemmed in by congressional actions like the War Powers Act, like restrictions on what action could be taken in Southeast Asia, in Angola, in Cyprus, and a whole range of other foreign policy issues.

Eugene McCarthy described this better than anyone I've come across. He said as regards the powerful presidency in modern American history, Richard Nixon killed it, Gerald Ford embalmed it, Jimmy Carter buried it, and

Ronald Reagan proved that there was life after death. And that's a fair summary of what we have seen in the changing character and estimate of presidential power. One of the hottest topics in Washington today is what kind of president George Bush will end up being. Is this going to be a powerful or a weakened presidency?

Congress also changes, less dramatically than the presidency, but very often it changes in important ways. In the early 1970s, at the same time the Congress was attempting to take on more and more foreign policy responsibilities, it was going through a massive set of internal reforms. Powerful committee chairmen were overturned. The powers of the leadership were curtailed, subcommittees proliferated and power in Congress as a whole became more and more diffuse. One of the first things I learned when I was working on Capitol Hill was that if you're walking down the hall and you see a Democratic member of the House of Representatives and you can't remember his or her name, just say "Good morning, Mr. Chairman" or "Good morning, Madam Chairman" because all the Democrats are chairman of something or other and you're bound to be right if you use that title.

Things have changed a bit since the 1970s and there is a trend back toward more centralization of authority within the legislature, but not much. We have to be careful talking about the institutions that make up American government because they do change and shift.

Politics More Than the Three Branches

There's a third problem in this whole area of separation of powers that's also worth keeping in mind. We don't want to make the mistake of believing that if we have described the powers and the relationships among the three branches of government, then we have completed the survey of politics in American government. In fact, many other important institutions serve a mediating role in the contests and relationships among the three branches. Political parties, for example, may be weak. Particularly weak when it comes to choosing presidential candidates. But they are important institutions and they affect relationships between the White House and Capitol Hill. We also have interest groups: lobbying organizations, think tanks, law firms, and all the other people here in Washington attempting to influence national policy. And, finally, the media, particularly as an instrument of communication between the branches of government. The same stories in *The Washington Post* and *The New York Times* and on the TV news programs supply the base of knowledge by which everyone's day begins and very often ends in Washington.

Political scientists are particularly weak in not giving enough attention to the importance of that particular institution in our government.

Separation of powers is difficult. It describes institutions that are themselves changing, and those institutions naturally don't tell us the whole story of American politics.

The current state of affairs between the president and the Congress is an important subject when you're considering separation of powers. I'm not using the term in its narrow, precise constitutional sense but in its broader and more common-sense meaning, a government of separated institutions sharing powers. How are we doing in that business today?

An Era of Bipartisanship

I think we now have a president who is genuinely interested in bipartisanism and in good relations with Congress. Unlike his two immediate predecessors, Jimmy Carter and Ronald Reagan, we now have a president who knows the Congress. He served in the House of Representatives, not for very long, but long enough to understand what that institution is about, long enough to make political friendships which have continued throughout his public career. He is less likely to make the kind of attacks on Congress that we heard from Jimmy Carter, who thought the U.S. Congress was just like the Georgia State Legislature. Or from Ronald Reagan, who made attacks on Congress a rhetorical theme throughout his administration. We're not likely to see that from President Bush.

Moreover, even if he wanted to do that, he's in a very weak position to use such a strategy. He was elected to office with no discernible coattails, and he faces Congress controlled in both houses by the opposite party. Bipartisanship is the only way he's going to be able to accomplish anything, and indeed he has been very accommodating to important

Democratic members of Congress in the preparation of his savings and loan proposal, in the resolution of the *contra*-aid issue, in being more forthcoming about environmental legislation, and a whole range of issues.
Ironically, the president has become the proponent of bipartisanship at precisely the time that Republican members of Congress, particularly in the House of Representatives, are engaging in an escalation of partisan politics within their institution. President Bush did stay with the Tower nomination throughout, but to some extent he remained aloof from the depths to which that debate fell. He said almost nothing about Speaker Wright throughout his difficulties and even publicly chastised his national party chairman for a highly partisan attack on Speaker Foley. It will be very interesting to watch the dynamics of this relationship. The bipartisan Republican President may end up being sabotaged in part by hungry and aggressive members of his own party within the Congress.

There's a third reason for the president's interest in bipartisanship: the absence of any decisive national issue. We have no Vietnam War. The closest equivalent in the 1980s has been the difficulties in Central America, which at least for the time being the president has defused. We have no domestic economic crisis. We have lots of potential economic problems related to the deficit and what it may be doing to the economy, but the Democrats and Republicans avoided that subject in the 1988 campaign, and both Congress and the president are engaged in regular gamesmanship on that issue, pretending that the problem is far less difficult than it actually is. We also have a Congress that is genuinely interested in bipartisanship and in good relations with this president.

A Weakened Congress

The Congress has been noticeably weakened by the ethics issues that have come to the fore in recent months, and by the public reaction to the pay raise issue. When I started working on Capitol Hill, it was in the small staff serving a member of the House of Representatives, and we all took turns opening mail and answering the phone. Neither of those jobs was particularly fun while the pay raise issue was on the floor of the House. The public reaction to that was bitter, widespread, and extremely negative and we had rules in this office that we would listen to all those criticisms as long as they came from our district. When people called from elsewhere we pushed the button and let their messages go, but there were plenty of people calling from the district to tell us what they thought. So the Congress is in a very weak position to be assertive vis a vis the president.

Moreover the new leadership in the Congress, particularly Speaker Foley and Majority Leader Mitchell, are by their personal background and style far less confrontational and partisan than many of their predecessors in those offices. We're unlikely to see from them great contests with a president who, of course, wants to avoid a confrontation himself.

And, finally, the Congress is very interested in bipartisanship because they frankly don't have very much to do. There isn't much of a national agenda. We have not done very much about resolving the national deficit, but we have made cuts and we have made changes in congressional behavior. It is well understood that there is virtually no new money for new and dramatic programmatic initiatives. It simply isn't there. An awful lot of people on Capitol Hill are frustrated by that fact, but it is reasonably well accepted. It means that they cannot create new programs without taking money from somewhere else. We already know that they cannot find enough money to solve the deficit, and they're surely not going to find enough to begin a new program.

As a result, the Congress wants in the issues that it currently faces to share responsibility with the president. They don't want to do the savings and loan issue alone. There's no political benefit in that kind of bailout measure. They want to make sure the blame and the responsibility are equally divided.

A Murky Accommodation

Well, what happens in an era of bipartisanship and cooperation between president and Congress? In periods of confrontation between the branches, issues of separation of powers would rise to the fore. In the latter years of the Nixon administration, there were great public contests about the meaning of war powers, the extent of budget authority that the president might have, the question of executive privilege and the sharing of information, the ability of the president to keep secrets and conduct covert

operations. Those constitutional questions became terribly important in that era of confrontation. We might suspect that in a period of relatively good feelings between the two branches we would find that there was mutual adherence to constitutional niceties.

In fact, it isn't that way, and let me just give you the most prominent of recent examples. How did the president and the Democrats in Congress work out their differences on *contra* funding? Well, first of all, they did it by funding them only with humanitarian aid, and only for a brief period of time.

But furthermore, they did it with a whole package of constitutionally questionable reporting procedures that the secretary of state promised to carry out. His promises to the leaders of the House and Senate and to the chairmen of relevant committees were not made in the law, but in letters submitted at the same time the law came to the House and Senate. It is in constitutional terms a murky resolution of the question of which of the two branches has authority in foreign policy. It's an adequate compromise of that issue for at least a period of time.

The current bipartisanship is not necessarily an indication of complete trust. There are still partisan feelings. Moreover there is weariness and suspicion on the part of both the executive and the legislature.

Congress continues to earmark appropriations and to limit executive discretion on a whole range of issues. The executive continues to issue massive regulatory legislation. Both continue to accept various forms of legislative vetoes and temporary grants of power that are at least arguably unconstitutional.

Well, what are we to make of this? Some people say that it's an indication that our Constitution is adaptive, flexible. One of the most popular phases is to call ours a living Constitution. I've never particularly liked that phase because I've always thought, whether you believe in Darwin or divine creation, that living things were rather well made.

I'd prefer to describe our constitutional system as an old and reliable automobile. It was very well designed and it was very well built, but it has a lot of miles. Some of its parts have been replaced in the course of its history. In a few places it's held together with hangers and loose string. It sputters, it misses, it leaks oil. Occasionally, it dangerously overheats. But it continues to take us from one place to the next and to provide us with reliable transportation and it should never be traded in for the newer showroom models that claim to be better.

CHECKS AND BALANCES: ADJUSTING THE CONSTITUTION TO MEET MODERN CIRCUMSTANCES

Donald Robinson

I'm a political scientist, not a lawyer, and so I would like to offer a few reflections about the Constitution and how it is affected by the environment in which we find it. We need to be careful about that because we don't want to get into the mistake of saying or implying that modern circumstances have rendered the Constitution obsolete, that we, in our modernity and with all the complexities we face, know a great deal more than the framers knew and, therefore, must move beyond their understanding.

I think we as American citizens depend upon that thinking and in general give it enormous respect. But I think we ought also to recognize that a constitution's meaning is shaped by circumstances, and I want to draw attention to some of today's circumstances.

I want to begin with an observation from Alexis de Tocqueville's *Democracy in America*, the great reflection on American society and culture and mores written in the 1830s. There isn't a great deal in *Democracy in America* that deals with the Constitution, but what few passages there are, are enormously interesting and helpful. He has one passage on executive power, and I would like, if I may, to begin by quoting that. De Tocqueville writes that it is chiefly in foreign relations that the executive power of a nation finds occasion to exert its skill and its strength. If the existence of the Union were perpetually threatened, the executive would assume an increased importance. However, the United States is in a quite different circumstance. The president of the United States is commander-in-chief of the army, but the army is composed of only 6,000 men. He commands the fleet, but few sail. He conducts the foreign relations of the Union, but the United States has no neighbors and is separated from the rest of the world by an ocean and is too weak as yet to rule the seas. It has no enemies and its interests rarely come into contact with those of any other nation of the globe. De Tocqueville concludes that the president of the United States possesses almost royal prerogatives which he has no opportunity of exercising and privileges which are very circumscribed. The laws allow him to be strong, but circumstances keep him weak.

Time for Adjustments?

That was in 1830. The circumstances have changed. In light of those changed circumstances, do we need to think about adjustments in the system of checks and balances which the framers provided? We rely on two things as safeguards of liberty and self-government in this country. One is the rule of law and the other is our system of checks and balances operating in the context of the separation of powers.

In the field of war powers, those two factors are quite problematic. The rule of law does not govern the use of national power in the field of foreign relations. When the president now must decide what to do about the Middle East, what to do about Central America and other trouble spots around the world, he will not be guided in that by law. That is a matter where policy is made by the president with his advisors with his understanding of our national security interests and other interests around the world, and it is not guided by law anything like the same way, for example, that the war on drugs in the United States is being conducted.

Similarly, checks and balances operate sporadically and in most cases ex post facto, that is after the action has been taken. And so our system of checks and balances doesn't operate externally as it does internally, either.

Going Beyond Locke

I would like to glance back at the philosophical traditions and call attention to one or two

besides those of John Locke, Baron de Montesquieu, and Blackstone. I am prepared to accept those authorities, but I would point out one thing that they have in common in addition to those that have been mentioned. They all depend upon and cite a doctrine of separation of powers but they do not separate the power of government internally from the power of government externally.

Locke, for example, has, as we do, a tripartite separation of power. But whereas ours is executive, legislative, and judicial, Locke's was legislative, executive, and what he called federative. If you look at Locke's *Second Treatise*, you find this quite remarkable difference from our own understanding. Locke wrote at a time when he was trying with others to establish the supremacy of the legislature over the policy of the government that was being established and he endorsed that doctrine of the supremacy of the legislature that is rule of law.

On matters of internal policy, taxation, internal police powers, and so on, the crown must rule according to law, Locke said. Liberty requires that. But Locke recognizes in Chapter Twelve of the *Second Treatise* that in war and foreign relations it is not possible to subject the government to prior control. Therefore, it is necessary to distinguish the executive from the federative power. The federative power he defines as follows: It is the power of war and peace, leagues and alliances and all transactions with other persons and communities outside the commonwealth. He goes on to say that the federative power is much less capable to be directed by antecedent, standing, and positive law than the executive. That's the difference. You can't control federative power by antecedent standing positive laws.

The point that Locke is insisting upon here is that in foreign affairs the government, the crown, is not just executing law. It is not carrying laws into effect. It is carrying out a quite distinct function. The two functions are almost always united in one set of hands, that is in the executive which takes its name from one of its functions, but the conduct of foreign relations is very different from the other functions of the executive and the difference has to do with the role of the rule of law.

In the internal exercise of the executive function, the executive is confined to the rule of law. In the external function, you cannot confine the executive to the rule of law. That is the argument in Locke's *Second Treatise*. Particularly in foreign policy, though also sometimes domestically, Locke argues that the crown has prerogatives, a very important concept. Prerogative is the power to act according to discretion for the public good without the prescription of law and sometimes even against it. That's prerogative, and in foreign policy the government is going to have prerogative.

Montesquieu we can deal with briefly because the framers dealt with him briefly. They cited one chapter of his book. Montesquieu too has a tripartite separation of powers and he identifies them as the legislative, the executive in relation to internal matters, and the executive in relation to external matters. Again the same distinction that Locke was talking about. You do not find a separately defined judicial power in either Locke or Montesquieu, interestingly enough.

And with Blackstone too, you get not a separation of powers but the same recognition that the exercise of the executive power in external relations cannot be bound to the extent it is internally by law.

"Shall Take Care" Clause

The important point here is that for this philosophical tradition that the framers relied upon, there was a separate function of government in external relations. The framers rejected this tradition. It is nowhere to be found in our Constitution. The rule of law according to the framers--and they were lawyers almost to a man--must pertain to everything a president does. The take-care clause of the Constitution is a quite deliberate attempt on the part of the framers to make this point. The clause says that the president shall take care that the laws are faithfully executed. That is very extraordinary language in our Constitution. Our Constitution is a very dry document rhetorically. It does not have adverbs of emphasis. I think nowhere else in the Constitution is there an adverb of emphasis, and in this phrase there are two adverbs of emphasis, one being the phrase "take care" and the other being "faithfully." The framers do not say, as they might have said, the president shall execute the law. What they say is that he shall

take care that the laws are faithfully executed. It is as if the framers were wagging their finger in the president's chest and saying there is no prerogative under this Constitution, never mind what Locke said about having to act without the prescription of the law or sometimes even against it. You shall take care that the laws are faithfully executed.

As far as the idea that the president might sometimes have to act in foreign policy without the law, that is nowhere recognized in the Constitution explicitly. It may have been understood, and I think to some extent it was. What strikes me is the extent to which the president's foreign policy powers are not defined in the Constitution. And I think that represents to some extent naivete, not necessarily on the part of Hamilton and Gouverneur Morris or perhaps even James Madison, but on the part of some of the framers and some of the ratifiers. They had not thought through carefully what would be entailed in conducting foreign relations with other countries.

That, I think, is part of what de Tocqueville is saying in *Democracy in America*. Remember that this Constitution was framed by a people who were quite jealous about governmental power. They were particularly jealous about executive power. It's true that the Constitution was framed at a high-tide moment in terms of confidence and executive power. Gordon Wood has said that only in 1787, as far as that entire 18th Century is concerned, could you have gone so far as the framers did in the direction of strengthening the executive power, not before and not later. Even at that point, there was quite a bit of alertness about executive power and its dangers, and I think if the framing generation had anticipated the exercise of executive power in foreign relations, they might have hedged it about a good deal more carefully.

Inadequacy Recognized Early

Almost immediately, though, the framers became aware that the powers of a government as illustrated in the Constitution were inadequate to the conduct of foreign relations. Thomas Jefferson campaigned for the presidency on a promise to restore the government to a strict interpretation of the Constitution. He was quite alarmed by the notion that there would be a broad exercise of implied powers under the Constitution. He took office in 1801 and almost immediately there came an opportunity to acquire one-third of the continent, the Louisiana Purchase, from France. This confronted Jefferson, given where he was from politically, with an enormous challenge. What was he going to do? He, of course, wanted to acquire this territory. Of course, it was in America's interest to do so.

That very able lawyer, Thomas Jefferson, and his very able lawyerly friends searched the Constitution in vain for power that would justify this acquisition. He acted anyway. He set this precedent right in the foundation stone of the American republic.

No War Without Cooperation

There are other exceptions to the commander-in-chief powers as exercised by President Polk, and there is, of course, Abraham Lincoln's conduct of the presidency during the Civil War. The great presidents, at least some of them, have exercised prerogative despite the framers' rejection of that doctrine, but these are exceptions. For most of the first 150 years under the Constitution, certainly through the Second World War, the Constitution's war powers clauses acted as the framers intended that they should: that we cannot take this nation into military action of any consequence without the cooperation of the executive and legislative branches. When all our talk is done, I think that is the fundamental intention of the framers. Their most fundamental doctrine was that power must never be exercised by anyone alone.

It's unquestionably true that presidents have sent military force into hostile situations without declarations of war by Congress. It is also true that in each of those cases there was collaboration and cooperation and consultation between the president and the leaders of Congress. That is the invariable rule prior to the end of the Second World War.

Two Major Changes

Then, at the middle of the 20th Century two circumstances occurred which have changed the way in which the war powers clauses of the Constitution in fact operate. First, in 1950 we committed ourselves to a permanent standing army. Until then we had radically demobilized

the military forces after every war they had been built up to fight. Ever since 1950 we have had a permanent standing military force never less than 2 million men and women in arms. The president has soldiers, rockets, communications equipment and so forth to wage modern warfare standing at his disposal. He need not go to Congress to raise forces.

The second major thing that happened in the middle of the 20th Century was that for the first time in our history, we entered into a worldwide network of entangling alliances, despite Washington's advice. In 1948-1949, we entered into the NATO treaty, the SEATO treaty, bilateral treaties with the Philippines, with Formosa, with Japan, a number of other countries around the world, the Rio Pact with Latin American countries. The NATO treaty says that we will respond to military attack on any of the nations in that alliance as we would respond to an attack on ourselves by the same constitutional process.

What is our constitutional process for responding to an attack upon Staten Island or San Diego? The answer is the president mobilizes our forces and we respond, and never mind a declaration of war. The NATO treaty says that for our constitutional purposes, an attack on Copenhagen is the same as an attack upon the United States. Now, that changes the constitutional situation. The president is now able to regard the territory of 45 nations around the world as tantamount to our own, and he can respond to sudden attack upon them by bringing the full military force of the United States to bear.

My point is simply this: In these changed circumstances, with a standing army and with a worldwide network of treaty alliances, the checks and balances in our constitutional system operate differently than they did before 1950. The commander-in-chief no longer needs to go to Congress to raise military forces or to get legitimization for responding to attacks around the world.

The only way to recover the situation prior to 1950 would be to dissolve the standing army and abrogate those treaties, but none of us wants to do that. We believe we need these forces for the defense of the free world, and we need this system of treaty alliances.

Reconsidering the System

Now, therefore, I think we're in a situation in which we need to reconsider the constitutional system in order to recover the framers' sense of what this Constitution guarantees us. It guarantees us checks and balances. It guarantees us that no one person can take this nation to war.

Recent presidents have acted in world affairs out of a sense of their own understanding of our strategic interests. Jimmy Carter, for example, acted that way in the abrogation of the treaty with Taiwan that led to the opening to China, in the Camp David accords to which he attached American authority and support, and in the attempted rescue of hostages in Iran. In the next administration, that of Ronald Reagan, we had the assault on Libya, the invasion of Grenada, the encouragement of private and third-nation aid to the *contras*. In all of those affairs, Ronald Reagan and people who served at his pleasure conducted the foreign policy of the United States and applied military force in pursuit of their understanding of the nation's interests.

I do not mean to argue at all about the substance of those policies, and I'm certainly not taking a stand that one or another set of policies is correct. I am only pointing out a constitutional fact, and that is that modern presidents have operated according to their own understanding. My argument is that the framers may have erred in failing to distinguish between domestic and foreign governance. I've argued secondly that particularly in the field of foreign policy, the rule of law and checks and balances as they are presently in the Constitution may not be sufficient to ensure government by consent of the governed. Thirdly, that the modern situation exposes and exacerbates this shortcoming in our constitutional system, and that it may be necessary under modern conditions to make some modifications in the constitutional structure of our government in order to correct this fault.

Finally, the framers' greatest legacy to us is their example to take strong and carefully considered action when the existing frame of government seems unable to secure the blessings of liberty. We honor them best when we are willing to follow this example.

THE FRAMERS' VIEW OF EXECUTIVE POWER

Daniel Troy

Imagine a "Star Trek" episode featuring Alexander Hamilton. Let's call it "Star Trek 1776." Given that many "Star Trek" episodes end up here in the 20th Century, let's bring it to the White House of 1990. What would Hamilton think of the modern presidency? After getting over the technological shock, he'd probably be pleased by the central role that the president plays in our national psyche. But I think he'd be somewhat concerned about the state of separation of powers today because Congress has, in the wake of Vietnam and Watergate, increasingly sought to weaken the very institution of the presidency. But to test whether Hamilton's concern would be justified, let's look at what he and his contemporaries thought the Constitution meant by the phrase "executive power."

Article II of the Constitution concerning the executive seems to grant the president very few powers. Those that are listed in the text can be divided into basically four main categories: his legislative powers, his management powers, his foreign affairs powers, and his executive powers.

First are those powers that relate to his participation in the legislative process--the veto power, the power to recommend measures to Congress, the power to call Congress into emergency session. The president has the authority to adjourn Congress only in the case of a dispute between the two houses of Congress as to when they are to adjourn. The president is also charged with the responsibility to give Congress information about the state of the Union, the originator and genesis of the State of the Union address.

The second broad category consists of his powers to manage the executive branch. He can request opinions from his cabinet officers, and the fact that he can request them as opinions makes clear that we don't have a councillor form of government. He can decide who will work for him, subject to the advice and consent of the Senate. As to his superior officers, the heads of departments like the secretary of state and the secretary of treasury, he has the power of recess appointments when Congress is not in session and he can authorize those officers to appoint inferior officers.

Third are his so-called foreign affairs powers. These are pretty limited. He can make treaties with the advice and consent of the Senate. He can receive ambassadors and other public ministers. And he serves as military commander-in-chief, although Congress must raise the army and Congress has the power to declare war. That's all.

Contrary to popular belief, nowhere does the Constitution say anything about the foreign affairs powers. Congress has the power over foreign commerce, but the general power to formulate and direct our foreign policy is nowhere allocated in the text of the Constitution.

Fourth, the president has powers related to his authority as chief executor of the laws, which includes the pardon power and, most important perhaps, the power to take care that the laws are faithfully executed.

Debate on Article II

This is not an incredibly long list, especially when compared with the list of congressional powers set forth in Article I, Section 8. We can, therefore, ask the question, Where do the president's powers come from to claim executive privilege, formulate and direct foreign policy of the United States, and initiate the use of force short of war -- all not expressly mentioned in the text?

A debate focuses on the first sentence of Article II: "The executive power shall be vested in a president of the United States of America." There are at least three competing theories on how to read this key sentence. First, that the sentence is not an affirmative grant of power. Second, that the sentence doesn't much matter, for the foreign affairs powers, and many of the president's powers, come from outside the Constitution. Third, that it is an affirmative

grant of the executive power to the president, the phrase "executive power" having a definite and certain meaning.

The first theory reads the first sentence of Article II as naming the office, that it shall be a president, not king, not anything else, and making plain that there shall be only one person holding the office instead of the executive council proposed during the Constitutional Convention. Those who subscribe to this theory, though, must derive all of the president's powers from the foregoing expressed delegations. They generally say that the Constitution paints in broad brush strokes, states broad outlines, and creates, in the words of Professor Edwin S. Corwin, a noted presidential scholar, an "invitation to struggle" between Congress and the president for the management and control of our foreign policy.

A Troubling Idea

The problem with this theory is that the enumerated powers are too limited and narrow to explain all of the powers judicially associated with the president. Moreover, because Congress is limited in Article I to only the legislative powers therein granted, it would mean that the Constitution does not vest in the national government those powers not listed in the enumerations. This is troubling. It would mean that no one has the authority to, for example, send ambassadors abroad because the power is only to appoint ambassadors, not to send them or give them their instructions. It doesn't say who gets to give the ambassadors instructions. The Constitution does not assign authority to fire errant executive branch officials or to use force short of war.

The second theory was advanced by Justice Sutherland, who wrote into law the views that he had formulated as a senator, when one suspects that like most senators he entertained presidential ambitions. Sutherland contended that upon its creation, the United States was vested with the inherent attributes of sovereignty, and this sovereignty included the powers that all other national governments have over their foreign affairs. Under this view, the powers of the United States government to act on an international plane vis-a-vis foreign nations are extra-constitutional. The Constitution doesn't vest them. They are there because when the United States was created by the Declaration of Independence, those powers devolved straight from Great Britain.

The Sutherland theory is based simply on bad history. It ignores the most important innovation of the American Revolution, dividing the sovereignty between the federal government, the state governments and the people. It is also not at all helpful in locating a particular power in Congress or in the president in the case of a dispute. To the extent that it views these powers as shared, it is at odds with the way the Constitution allocates powers. If anyone tells you that certain powers are shared, foreign affairs powers or whatever, think of the veto power. That is the way the Constitution works. The president has the veto power, and Congress does not.

Finally, the Sutherland theory would not allow the president enough power to avoid the tendency of Congress that Madison identified in *Federalist* 47 where he wrote that "The Legislative Department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

Hamilton's View

The third theory is associated with the hero of our little episode, Alexander Hamilton, who articulated it in a celebrated debate with James Madison about whether President Washington had the authority to declare the neutrality of the United States in a war between England and France, who seemed to fighting every few years during the 18th Century.

Hamilton relied on that first sentence of Article II, reading it as a general grant of power, and he contrasted it with the language giving Congress only all of the legislative powers specifically granted. Hamilton said, "The general doctrine of our Constitution is that the executive power of the nation is vested in the president, subject only to the exceptions and qualifications which are listed in the document." Hamilton argued that unlike the list of Congress's powers, the listing of the president's powers amplified, and, perhaps in some cases, limited the president's powers, but was never intended to be a complete enumeration of all of his powers. Hamilton said the difficulty of a complete enumeration of all of the cases of executive authority would naturally dictate the use of general terms. The different modes of expression employed in the

Constitution in regard to the two powers, the legislative and the executive, confirm this inference. If we assume the president has generally granted power, what do the Constitution and Hamilton mean by the executive power of the United States?

To answer that question, it's helpful to have a sense of the intellectual world of the framers. More Americans could read and write in colonial America than in any other nation on earth. Anyone who had any schooling had been drilled for eight to ten hours a day in Latin and Greek. There were fewer books, so those they had they read and reread.

Thus, Thomas Jefferson could honestly say that he had written the Declaration of Independence without referring to any book or without citing anything, because the ideas in John Locke's *Second Treatise* were so commonly known. Those who read the phrase "life, liberty and the pursuit of happiness" in the Declaration of Independence knew he was quoting and amending Locke's *Second Treatise*.

It's important to realize that there was no executive under the Articles of Confederation. There was not sufficient unity and energy in the government. There was no central force able to direct the management of the government, and hence the executive power of the nation couldn't have been defined by reference to the previous national constitution. You couldn't just look at the Articles and say, oh well, that's what they meant.

Now, some of the state constitutions, especially New York's, did have powerful executives, but the states under the Articles and even more so under the new Constitution had few foreign affairs powers. The foreign affairs powers were what they gave up to the national government. So, state constitutions were somewhat less than helpful in defining the phrase.

Blackstone's *Commentaries* and Executive Powers

The three great thinkers who taught the framers political theory, the Scotsman David Hume, the French Enlightenment intellectual Baron Montesquieu, and John Locke, were either too muddled, too general, or did not address the issue of exactly what was meant by executive powers. They talked in general terms, the executive powers, the powers that lead the nation in war or in foreign affairs, but they didn't get any more specific than that.

Instead, the famous thinking on this issue is influenced most by the bible for 18th Century lawyers, the *Commentaries on the Laws of England* by Sir William Blackstone. It's really hard for us today to conceive of Blackstone's influence and power on colonial thinking. Blackstone's *Commentaries* were an enormous best seller among both lay and legally trained colonialists. There were more copies of Blackstone in the colonies than there were lawyers, a situation some might wish for today, and he was the second most frequently cited author in all American political literature from the 1760s through the the 1780s. James Madison described Blackstone's book as being "in every man's hand."

Blackstone's *Commentaries* defined at great length the royal prerogative of the king under British law, the traditional powers of the king. Now many of these traditional powers were given to Congress, in Article I, Section 8. What was left, however, is the executive power of the president.

This is no mere academic debate. To illustrate, let's just take the president's power to receive ambassadors and other public ministers. Madison argued in his exchange with Hamilton that it was purely ceremonial. Well, let's assume for a second that he's right. Who is it then that negotiates with foreign countries with respect to matters short of formal treaties? For example, who would negotiate on behalf of the United States to free a hostage, which was not the kind of thing that would require a formal treaty to be submitted to the Senate for its advice and consent. Congress has no such power; it's not one of those powers specifically granted by Article I. Nor has Congress the competence to conduct negotiations with foreign governments. The traditional, and, I think, correct answer is to say that the power is vested in the president as part of the executive power.

The framers created a mixed government. It divided up powers that they thought inherently executive or inherently legislative in new ways. They gave the president certain legislative powers, and they gave Congress more inherently executive powers. Just as we can discover the

powers of the Supreme Court by looking to the historical powers of the courts, so too can we discover the meaning of executive power by looking at what powers were historically considered executive, what that phrase meant to colonial America. In essence, the executive gets the power that's left over, all those powers vested in the national government and not listed in Article I as belonging to Congress.

Methodology for Interpretation

This applies to the other general clauses as well. The power of the British king over the standing army was plenary. He raised, governed, led the armed forces. The framers, however, were terrified of a standing army, and so they divided the power over the armed forces. They vested in Congress the power to raise the army, to make rules and regulations governing the armed forces, to provide the circumstances under which the president could call forth the militia, and the power of the purse over the military. But because the list of congressional powers is exclusive, Congress was not given the power to direct the army, nor, more important, to use it to defend this country in circumstances short of war.

Only two conclusions are therefore possible: One, that the power to use the army to defend the United States or to use force short of war is simply not vested in the national government, which would be an absurd conclusion because the Constitution's not a suicide pact, and you can't have a national government that can't act with the use of force short of war. Or, two, that the power is vested in the president as commander-in-chief and guardian of the executive power. That is Hamilton's answer, and it has by and large prevailed.

To figure out what the Constitution means by executive power, first look at Congress' powers. If it lacks a particular power, and if it's one of the traditional powers of the British king as defined by Blackstone, it may well be granted to the president under the executive power clause. I don't mean to suggest that the interpretation of a constitutional provision such as executive power can be easily reduced to a mechanistic formula. It can't be. But I've tried to state a methodology for approaching the question. As is always the case in law, especially where a constitution is involved, hard questions, ambiguities, and line-drawing problems will remain.

In conclusion, before beaming back to the 18th Century, Hamilton would be disturbed, I think, by the endurance of the two theories denying that the first sentence of Article II is a grant of executive power of the United States. On the whole, though, he would be pleased that in the eyes of most he has won his argument with Madison that the first sentence granting the president executive power is a hook on which many presidential powers hang. The Constitution cannot be read any other way.

THE DYNAMICS OF CONSTITUTIONAL DECISION MAKING: THE REAL PICTURE

Louis Fisher

I want to offer my impression of how constitutional law is taught in the schools, how you do it and how schools might better approach the subject. My impression is that when constitutional law is taught in elementary and secondary schools and in colleges and in graduate schools and in law schools, the general approach is to say that constitutional law is shaped by the Courts and by the courts only, and that, therefore, the U.S. Supreme Court is the final word on what the Constitution means. As teachers, I hope you would see that that's not at all accurate historically.

That's not a fair presentation to give to students, and I also think it is not a fair burden to put on the Court. Although perhaps judges at times like to think of themselves as the shapers of constitutional law, if you look over history, that's much too big a burden for the courts to bear. And if you look at decisions, I think you'll find that judges and courts have very sophisticated ways of shoving those issues out of the court system back into the political system where much of it is resolved.

A Dynamic Process

You have to be very practical as teachers on what you can accomplish in the classroom, so I'll give you what I think are some fairly basic materials that I think students can appreciate. I think kids, whether they're in elementary school or in graduate school, are not well served when they get a very simplistic picture that turns out not to be the case at all when they get into real life. They can handle quite well, not the simplistic picture that the Constitution is what the judges say it is, but rather the picture that exists, that it's not a political free-for-all, but it is a very dynamic process in which a lot of the constitutional questions are decided purely by Congress and the executive and never reach the courts.

When they do reach the courts, I think the record is very clear that the courts generally uphold the determinations made by the two political branches. Then you have another subset where the Court will strike down actions by the president or by Congress. But if you look at it long enough, you'll find out that after that Court decision it gets back into the political stream, and pretty soon Congress and the president are doing something quite different from what the courts said they should. It is a very dynamic picture.

Historical Examples in the Classroom

So, what could you do in a classroom? The kids appreciate some historical viewpoint, so one place to start would be 1789, first year of the First Congress, when a lot of big constitutional issues had to be faced. Many of the members of the Congress had been to the Philadelphia convention so their interpretations are what we call contemporaneous interpretation of the Constitution. They didn't have Supreme Court cases or law court cases to guide them. Take some time to look at some of the debates in 1789, James Madison and others, very sophisticated debates on what would or would not be constitutional. Many of those precedents established in 1789 still prevail, and you'll find elements of them today.

Another stage is to bring in the presidency of Andrew Jackson in 1832. He vetoed the bill to revive the U.S. Bank. Many people thought he overstepped. Many senators and members of the House thought that his veto itself was unconstitutional. They argued that the U.S. Bank had been created in the past by Congress, that the U.S. Bank had been upheld by the Supreme Court in 1819 in the *McCulloch* case. Since the Court and Congress had already spoken, they argued that Jackson had no option at all but to sign the bill. Well, it's a very powerful veto message and I think parts of it your students would appreciate. Jackson didn't buy that at all. Just because a prior Court or prior Congress had concluded that the bank was constitutional did not take from Jackson his own

right to make an independent determination on whether it was or was not constitutional. He struck it down, and his veto was sustained, and presidents ever since have taken his view, not the narrow view of some of the senators who wanted to override him.

Prohibiting Slavery

Then moving up a couple of decades, you might want to consider the whole question of whether Congress could prohibit slavery in the territories. I think it's wonderful to read an inaugural address. I won't give you the year. I won't give you the president, but the president stood before his countrymen and talked about this divisive issue, whether slavery should be excluded by the territories, whether Congress had that power, and this president said that issue is a judicial question, which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit whatever this may be. Well, you probably know the timetable I'm thinking of here. The president giving the inaugural address was James Buchanan. He gave it on March 4, 1857. That was two days before the Supreme Court came down with its great decision on *Dred Scott*. So it wasn't speedily settled, and certainly wasn't finally settled. Congress would debate that in the years to come.

The next year, 1858, I think your students would enjoy some part of the Lincoln-Douglas debates where Lincoln argued that he would accept *Dred Scott* as it applied to the litigants, just to the parties before the Court, but he would not accept *Dred Scott* as a political judgment for the nation. He would not accept Chief Justice Taney's conclusion that Congress had no power to exclude slavery from the territories. Lincoln in his inaugural address denied that constitutional questions could be settled solely by the Supreme Court. He said if government policy on vital questions affecting the whole people is to be irrevocably fixed by the Supreme Court, the people will have ceased to be their own rulers. I think that's something your students can appreciate.

We do have a Supreme Court. It has very important responsibilities on making constitutional determinations. But if a majority of the court can fix irrevocably these decisions, then you have a hard time figuring out what it is we do in a society for self-government. Are all these things farmed out to the courts? Do we have no opportunity to participate on such questions affecting the whole nation? Of course, Dred Scott could be overturned by an amendment to the Constitution. That was done through the Thirteenth Amendment and Fourteenth Amendment and Fifteenth Amendment from 1865 to 1870. It's interesting that, even in 1862, before the constitutional amendments, Congress passed a statute prohibiting slavery in the territories.

Child Labor Laws

Also, I think your students could appreciate the history on the child labor cases where legislatures would attempt by statute to put constraints on the hiring of kids who were ten, eleven, twelve years old, taking them out of school, working forty, fifty, sixty hours a week in tremendously unhealthy conditions. Congress tried by statute to give itself the power to regulate child labor. The Supreme Court in 1918 said it was unconstitutional and Congress with its commerce power could not regulate in that area. Congress did not accept that as the last word. Congress then passed legislation to regulate child labor, this time not on the commerce power but on the taxing power. In 1922 the Supreme Court said that's unconstitutional, and again Congress didn't take that as the last word. In 1924 Congress passed an amendment to the Constitution to give Congress the power to regulate child labor. They never could get the three-fourths of the states they needed to ratify the amendment.

By this time, a lot of years are going by and you have the great revolution in the country in 1937 with the court-packing plan. You have some retirements from the Court and Franklin Roosevelt putting new people on the Court. In 1938 Congress passes a statute giving itself the power to regulate child labor, this time going back to the original foundation, namely the commerce clause. That's litigated, goes to the Supreme Court. In 1941 the Supreme Court unanimously upholds the statute. Well, that's a long time from 1918 till 1938, but at no time during that period did anyone pretend that the Court had answered that question to anybody's satisfaction, and Congress prevailed.

Last Word Not Always the Court's

I want to give you a more contemporary case to illustrate this dialogue between the Court and Congress and the executive branch. Maybe some of you have heard about the case of Goldman against Weinberger. It was a U.S. Supreme Court case in 1986. Captain Goldman was a psychologist in the Air Force for years. In service he had worn indoors a yarmulke, or skull cap. There never had been an issue about it. And there was an Air Force trial, and Goldman testified against the Air Force. After that trial, the Air Force said, we have a regulation that says you cannot wear religious apparel indoors.

This shows you how an attorney has to do more than work only in the court. The attorney for Goldman tried to get the Air Force to change the regulation. The Air Force refused. It got into the courts, up to the U.S. Supreme Court. In 1986, Goldman lost, 5 to 4. Rehnquist wrote the opinion, saying that the Air Force, because of the need for order and discipline, hierarchy and so forth, has a right to have such regulations. It was not the last word at all.

The attorney, having lost that case, then turns around and works with the House and the Senate. Each year there's a military authorization bill, and when that bill came along, they put on an amendment telling the Air Force to change their regulation, and that was passed and went to Reagan and was signed into law in 1987.

I believe if you look in most books on constitutional law, if you happen to turn to a section on religious liberties, you see *Goldman v. Weinberger* and that will be the end of the story in that book. But it wasn't the end of the story at all. Although the Supreme Court would not recognize Goldman's religious liberty, that didn't stop Congress from coming along and saying, no, that's an important value for us and we say the Air Force is wrong and has to change their regulation.

Rehnquist and Kennedy Confirmation Hearings

Let me get to the Rehnquist and Kennedy hearings. When Rehnquist's confirmation hearings for chief justice were being held, Senator Specter asked him, "Do you agree that the Supreme Court is the final arbiter on all constitutional questions?" And Rehnquist said, "Unquestionably." You get a question like that and you give a nice answer, "Unquestionably."

When Anthony Kennedy was up as a nominee for the Supreme Court, Senator Specter had some trouble with confirming him because in 1982 Kennedy had given a talk as a federal appellate judge in which he said that many constitutional questions are not handled by the courts at all, are totally outside the courts. Specter put heat on Kennedy to reverse course and give some answer along the lines that Rehnquist had given, and Kennedy wouldn't do it. He emphasized more and more his point that the courts are not the only players in constitutional law. Finally, to get the point across to Senator Specter, he said, suppose that the Supreme Court in the case of *New York Times v. Sullivan*, the libel defamation case, had come down the opposite way, making newspapers vulnerable to very large damage settlements. Had the Supreme Court done that, Kennedy told Specter, you should have as a U.S. senator come out on the floor and said the Supreme Court has this 180 degrees off, is totally wrong in this matter, and I'm now introducing legislation to protect newspapers so that we can have a robust debate in this society.

Role of Public Opinion

What role should public opinion have? I think it's very tempting for us to say public opinion should not have a role in constitutional law because the public is not knowledgeable and is vulgar and too prone to emotional sentiments, etc. I think that's too narrow a view on the role that public opinion plays. If you want a nice statement on public opinion by someone who is not a radical, go back and get a couple of passages from de Tocqueville. He said in the 1830s that the U.S Supreme Court is very powerful, but the power is the power of public opinion. He did not mean that the Court just puts its ear down to the rail to hear what's coming along. What he's talking about is that for the Supreme Court to be effective, its decisions must be implemented. It must have compliance. Therefore, the Court has to act as statesmen. They have to be aware of the culture they're in. They have to have a knowledge of history and political institutions. They can't get out too far in front. Otherwise, they'll be cut down. That is a role of public opinion.

I also think your kids would enjoy some talk about the flag salute cases. In 1940 the Supreme Court ruled 8 to 1 that states could compel students to salute the flag. The reaction to that decision was uniformly hostile from every sector, from newspapers, from law reviews, from the religious organizations. The case in 1940 involved the right of Jehovah's Witnesses not to salute the flag because it violated their own religious beliefs. Jehovah's Witnesses when they proselytize can be very harsh toward Catholics and Jews. Nevertheless, the Catholic and Jewish organizations all criticized the Supreme Court. They said you do not understand religious freedom in this society. You do not understand the right of minorities.

That was 1940. By 1942, under this pressure, three of the eight justices admitted error. They said it was wrongly decided in the concurrence. So, that brought the 8-1 down to 5-4. There were two justices coming on and by 1943, in a very wonderful decision by Justice Jackson, the Supreme Court reversed itself 6-3. I think rather than give credit to Jackson's beautifully written decision, you give credit to public opinion which told the Supreme Court you do not understand the Constitution. Go back and do it over.

Other areas, very volatile in this country where public opinion is overwhelming, include the death penalty. Courts can strike it down all they want, but if the public wants to reinstate it, whether it's California or anywhere else, it will be reinstated. Obscenity, I still don't know what prurient means, but it's been farmed out to the local communities and that's what obscenity means, whatever the public opinion says in a certain area.

And then privacy. You may remember the last couple of years there have been some of these cases involving how much law enforcement can do in detecting marijuana. In 1986 in the marijuana flyover case they got a fixed-wing aircraft and they went over at a thousand feet and took photographs and the Court allowed that evidence to be introduced. More recently they now have helicopters coming in at 400 feet, and the Court in all those cases and in a lot of cases says that society is not prepared to recognize that person's expectation of privacy. It's a very interesting phrase. What does the Court mean, society is not prepared? That the Court isn't any better able than you and me. They don't have a Gallup poll. So, what are they talking about? I think when the Court says that, they're simply saying that right now society isn't prepared to recognize that expectation of privacy. But what if society wants to by statute, if Congress wants to tell the FAA or whatever regulatory group, some limits can be put on how close you can go down on these helicopters and fixed-wing aircraft? I think it's up to the legislative bodies.

Court One Player Among Many

I'm going to conclude with some comments on the states. I hope when you teach constitutional law you can get across to your students that there's more than one constitution. There's one Constitution and fifty other constitutions. The picture's very, very clear that just because the U.S. Supreme Court doesn't recognize certain rights and liberties doesn't prevent states from saying we don't buy that at all. You may not recognize those rights, but we will in this state, or that state, recognize those rights.

California, New Jersey, Massachusetts, Wisconsin, Washington, Oregon, and a few other states simply looked at what the Supreme Court says on announcing certain doctrines, and said, we don't buy that at all. We don't believe it. You're not persuasive. We have our own Constitution. We have our own cultures. We have our own different value system at the state level, and we are going to adopt at the state level a verdict that you could not get in the federal courts. A lot of attorneys who in the past thought they could get victories out of the federal courts recognized this dramatic shift, and now, many times, frame their cases and file them in the state courts, not in the federal courts.

In all these areas, I think it would be a better picture not to say that all of this is funneled up through the federal system with the announcement coming from the Supreme Court, but rather that the Court is one player, a very important player, and it shares the task of what the Constitution means with the Congress, with the executive branch, with the states and with the general public.

SENTENCING COMMISSION TESTS SEPARATION OF POWERS -- AND PASSES

John R. Steer

My experience with the separation of powers doctrine has come mostly since I joined the United States Sentencing Commission. As general counsel to the commission I helped to coordinate the legal defense of the statute, the Sentencing Reform Act of 1984, which authorized the commission. By statute at least three of the commission's members must be federal judges. The commissioners are nominated by the president and are confirmed with the advice and consent of the Senate. They may be removed by the president but only for cause. The commission is labeled as an independent agency in the judicial branch of government.

My discussion of the limits on the judicial branch grows to a considerable extent directly out of the constitutional litigation involving the Sentencing Commission, because the statute is just literally chock full with interesting constitutional issues in the separation of powers area. There is the question about whether there can be such a commission in the judicial branch that makes rules that affect the liberty of individuals. There's the question of whether judges can wear two hats and be both members of the federal courts and also members of such a commission. There's the question of whether or not the president can have a limited removal authority over members of that commission, including those members who are federal judges. And finally, the question that was initially argued before the Supreme Court: whether Congress exceeded its authority under the separation of powers doctrine, although we call it delegation doctrine, in delegating to this commission too much legislative authority.

The time frame in which the litigation took place really was rather rapid. The initial filings took place in late 1987 and by January 18, 1989 we had an 8-1 decision from the United States Supreme Court. Before that happened, though, it involved probably well over half of the federal district judges, of which there are some 565 across the country. They had to face these very complicated and involved separation of powers issues and had to reach a decision. A majority, approximately 60 percent, struck down the statute as unconstitutional, the others voting to uphold it.

Along the way, the same questions were argued before four different circuit courts of appeals. Two ruled prior to the Supreme Court decision, the Ninth Circuit Court of Appeals on the West Coast striking the statute down, the Third Circuit in Pennsylvania and New Jersey and Delaware upholding it. The Fifth Circuit in Texas and Louisiana and the Southwest issued a supervisory order requiring that the guidelines be applied pending a final decision from the Supreme Court.

Historical Background to Litigation

I think to examine the issues we need to go back quite a ways. Let's focus on the limits on what judges can do and the limits on what the judicial branch can do. If we go back to the earlier days of our history, one of the first cases in which the Supreme Court or the circuit courts said something about that issue was the *Hayburn's* case. It grew out of a statute in 1792 that dealt with disability pensions for Revolutionary War veterans and their dependents. The statute said that basically it was the district and circuit courts that were to determine these pension rights, pension entitlements, but they would be subject to review and possibly revision by the secretary of war. The statute was ultimately amended before the case had actually reached the Supreme Court, but along the way, three different circuits ruled on it. The circuits uniformly agreed that these questions could not be handled by the courts as courts, because Article III says basically that courts can only handle cases or controversies in a judicial setting, in a court setting. These determinations, while they might look like court cases, actually were executive

determinations because they were subject to review and revision by the secretary of war. The decisions by several of the circuits, including the New York circuit which included Chief Justice Jay and Justice Cushing, indicated that had the statute conferred the responsibility not on courts as courts, but on the judges as individual commissioners, then perhaps it could have been validly exercised.

Several decades later in a case called *United States v. Ferrara*, the Supreme Court had occasion to look back at the *Hayburn's* case and basically to validate the dicta that these several circuits had written then. The Supreme Court in *Ferrara* expressed the view that in the *Hayburn's* case powers were understood at the time to have been conferred on the courts as courts, but had they been exercised by the judges as commissioners, they would have been valid.

Now *Ferrara* itself dealt with another interesting situation in which the Northern District of Florida District Court was given the responsibility of adjudicating certain land claims that grew out of the 1819 treaty under which Spain ceded Florida to the United States, and there again the question presented was whether or not the statute was valid. The statute in that case called upon the court to make the initial determination, but again it was subject to review and possible revision, this time by the secretary of the treasury. When the Supreme Court was presented with the case, it declined to hear it on jurisdictional grounds, and again cited as a basis for its decision the Article III limitations on what courts could do as courts. This again, according to the Supreme Court, appeared to be an executive determination because it was subject to review and possible change by the secretary of treasury. So we have those two historical cases that provided some background for the litigation that involved questions about whether judges could serve on the Sentencing Commission.

No Prohibition for Judges

One of the important factors that came up in this litigation, and it certainly has a bearing on an analysis of what judges can do, comes out of the Constitution itself, or actually the absence of a provision in the Constitution itself. There's a provision in Article I dealing with Congress called the incompatibility clause. It basically says that a member of Congress can't at the same time be serving in the executive branch, and vice versa. But there is no prohibition in the Constitution that says that an Article III judge cannot hold another office. We had several precedents early in our history where judges and justices actually held more than one office while they were a member of a court. Chief Justice Jay in 1794 was the secretary of state and also ambassador to England while he was chief justice. Chief Justice Oliver Ellsworth served as a minister to France. Chief Justice John Marshall was for at least a short period of time both chief justice and secretary of state, and while he was chief justice he served as a member of an executive agency called the Sinking Fund, which was responsible for refinancing the Revolutionary War debt. Quite a bit later, Justice Charles Evans Hughes served on a postal rates commission. In the World War II era, Justice Owen Roberts served on a commission to investigate the disaster at Pearl Habor and then Justice Robert Jackson served as the chief prosecutor at the Nuremberg war crimes tribunal. More recently Chief Justice Warren served as the head of the so-called Warren Commission that investigated the assassination of President Kennedy. With such precedents to draw upon, the Supreme Court ultimately said it was entirely appropriate to have judges on the Sentencing Commission while they were continuing to be members of an Article III court. But it did confine its decision to basically a principle that the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing.

Judicial Branch More Than Courts

Let's look briefly at the question about the location in the judicial branch of this rule-making agency called the Sentencing Commission. Again, there were several early cases that provided some precedent. There is also a contemporaneous reality that the Supreme Court, looking over the landscape of American politics today, noted that the judicial branch of government does in fact consist of more than courts. It has an administrative agency called the Administrative Office of the U.S. Courts. It has an education and research agency called the Federal Judicial Center. And the Judicial Conference of the United States, which actually consists of representatives of the courts, is in

fact a rule-making body, and has various rules advisory committees.

The Supreme Court observed that the Constitution really regulates powers. It doesn't divide up and delineate branches of government as such. But rather it sets out specific powers that are to be exercised by the various branches. The Court detailed a number of principles that had been laid down in earlier cases which basically serve to limit what the judicial branch could appropriately do in this situation. The Supreme Court said that Congress can delegate to the judicial branch nonadjudicatory, noncourt functions, provided that they are appropriate to the central mission of the judiciary, that they're not in conflict with what courts do in their everyday existence. The Court observed that sentencing historically had been something that while the Constitution doesn't say that it has to be in one branch or the other, its central focus is certainly in the judicial branch.

Then, taking another important principle that had been laid down in several recent cases, the Supreme Court said that in the Sentencing Commission case, there was no attempt by Congress to expand or aggrandize its own powers, and so there was no running afoul of that important principle.

The Court has basically said that judges are not per se limited by the Constitution from taking on other offices. They can assume other tasks provided that there is no impermissible impairment of the judicial function. And the judicial branch can be given additional responsibilities that are, we might say, auxilliary or closely related to the central mission of the judicial branch provided that there is no incongruity in the duty that is required.

Principle Can Go Too Far

As I have tried to present these arguments before a number of federal district courts and before two circuits, one thing that struck me throughout this is that there is often a tendency to approach the great separation of powers principles in what we might say is an overly simplistic fashion. Very often when the Supreme Court lays down an important rule, particularly a new rule, it will write very broadly and state things in a very sweeping manner, and then there is a tendency thereafter to whittle back on that and to say, well, we didn't quite mean it that way, or to go that far.

Separation of powers is, I think, one of those areas of constitutional litigation where if you take the broad principles literally, they can go too far. It's really quite a complex, interdependent area. The Constitution itself provides that that is so because there are certain areas where there is an intermixing of functions. Just to give one example, the president has both an appointment authority that he shares with the Senate and a lawmaking authority that he shares with Congress through the veto power.

Justice Jackson may have said it best in the *Youngstown Sheet and Tube* case in 1952 when he said that while the Constitution diffuses power, the better to secure liberty, it also contemplates that practice will integrate or disperse powers into a workable government. It enjoins upon its branches separation, but interdependence, autonomy, reciprocity, and that's the reality of separation of powers that we have to grapple with in this complex world.

TOUGH TIMES FOR SEPARATION OF POWERS

Patrick McGuigan

Several years ago, Ed Meese started a controversy with a series of speeches before the American Bar Association beginning in London and then in Washington, D.C., and then continued it with speeches at the University of Dallas in 1986. It was a sequence of speeches in which he called on the country to get reacquainted with what he called the intent of the framers. He said we need to engage in a dialogue with our forefathers, and open ourselves to the founders' teachings. I certainly think that's true, particularly in the area of separation of powers. I think we're getting a little too easily into simplistic descriptions.

This is how separation of powers works in the real world. When the Sentencing Commission was set up, they wanted to make all seven members judges. I and a lot of my allies and some senators and a few congressmen maintained that *no* members should be judges. The judges are the problem. Judicial discretion is the reason that we get wild disparity in sentences and you don't want to put a single judge on the Sentencing Commission. What happened, as often happens in Washington, was a compromise: they settled on three judges. Then there was the discussion about putting the commission in the judicial branch, but there were a few of us who argued that they're going to perform an executive branch function. They're going to be designing regulations that the judges in turn are going to have to implement. So, this should be an executive branch agency. Well, we lost that battle too, but we did get the commission created. And its members came up with very tough anti-crime guidelines--much more punitive toward criminals than had existed before in the federal system. Operating off the language of existing statutes, they brought in the wide ends, the dramatic extremes you could have in sentencing, and the extremes are going to be much narrower in the future.

Challenges to Separation of Powers

So, as a practical matter, I like the way the Sentencing Commission's guidelines are functioning. But as a matter of the intent of the framers, I believe that the Sentencing Commission is a violation of the Constitution's separation of powers. I supported the view of Justice Scalia, who stood there in lonely opposition and said no to the structure that was created.

A few years ago, Congress passed a legislative veto, for example, where for certain types of regulatory schemes they'd pass a law. Whoever the president assigned would design regulations and then Congress could veto those regulations and make them start over. It's sort of a simple way of describing what was going on. In essence the Supreme Court said, well, that's really not a good idea in the federal system.

Then came Gramm-Rudman where, of course, you had legislative and executive and, I suppose to some extent, quasi-judicial powers. You had all sorts of powers poured into one individual, the controller general, who, if spending levels in a given year were exceeding what they should under the Gramm-Rudman targets, this guy could say, "Whack," and start ratcheting the thing back and order across-the-board cuts. The Supreme Court said that's not a good idea.

So there were a couple of things there where the Court appeared to be playing its role as sort of the referee of our system and saying we're going to draw some pretty clear lines and make the judicial branch do its job, the legislative branch do its job, and the executive its job. The last couple of years have been pretty rough for separation of powers, in my opinion.

One Who Gives Up First Loses

Here's something Louis Fisher wrote several years back: "The Constitution supplies a general structure for the three branches of government, assigns specific functions and responsibilities to each, and reserves certain rights to the people. Armed with powers of self-defense, the branches of government intersect in various patterns of cooperation and conflict. How these basic principles of law operate in practice is a

question decided by experimentation, precedents, and constant adaptation and accommodation."

That's a very profound way of putting something that Attorney General William French Smith came up with in the early 1980s, when there was a big dispute going on between the Reagan administration and some members of Congress. Smith absolutely infuriated the liberal Democratic senators when he gave them this answer. They said, why won't you supply the answer to these questions we need to know immediately, and if you don't answer, we may find you in contempt of Congress. They actually did do that to some of the people who worked for him. And then Smith came up with this analogy. He said, "Well, it's sort of like a tennis match. You've hit the ball across the net. We've hit it back to you, now you hit it back to me, and I'll hit it back to you, and we'll see who stops hitting it first, and the one who stops hitting it first loses, and the other guy wins." The one who gives up first loses. As a practical matter accommodations often occur, and in a lot of ways. What the Court did in the *Morrison* decision in 1988 and in the *Mistetta* case in 1989, is I think sort of a convenient accommodation so that we don't mess things up. But I for one will continue to be concerned about this blurring of lines between presidential powers, legislative powers, and judicial powers.

Prosecutors Free of Traditional Restraints

I want to read to you from Scalia's dissent in the *Morrison* case, involving the controversy that surrounded the independent counsel provisions. Theodore Olson, who was being investigated by an independent counsel operating under the Ethics in Government Act of 1978, brought a lawsuit saying that the independent counsel provisions violated the law because they mixed powers, that you had a person who in some respects exercised judicial powers and in some respects exercised legislative powers and in a lot of respects exercised executive powers and yet was really responsible and accountable to no one.

The Supreme Court ruled 8-1 that the independent counsel provisions are fine, and gave long reasons as to why that was so. Here's what Scalia wrote in disagreeing: "That's what this suit is about. Power. Power. The allocation of power among Congress, the president and the courts, in such a fashion as to preserve the equilibrium the Constitution sought to establish so that a gradual concentration of the several powers in the same department can effectively be resisted. Frequently, an issue of this sort will come before the court clad so to speak in sheep's clothing. The potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."

That's very powerful, and the point he was making is that Congress had eight members of the Supreme Court saying to Congress, yeah, you pulled it off. And what did they pull off? They created a mechanism by which any time a a president does something really fundamentally offensive to a large number of members of Congress, they can say to him, we don't have to threaten to impeach you anymore, which is what the Constitution provides. Instead, we'll appoint an independent counsel and we'll make your life be like Ed Meese's life was for four years. We'll investigate every relationship going back a decade. We'll look at your friendships. We'll find out if you return your friend's phone calls, and if you do return your friend's phone calls, and subsequently they get government contacts, well, maybe we'll investigate that, too.

Now, why is this an important consideration? Because traditionally prosecutors are accountable. Prosecutors are held in check. By what kinds of mechanism are prosecutors held in check? In a lot of cities and towns district attorneys are actually elected by the people. Often prosecutors though are merely responsible to someone who's elected, and that's how it is in the federal government. The attorney general and his people are responsible and accountable to the president of the United States. Now, what the independent counsel provision has done is create a structure for investigating and prosecuting executive branch officers, entirely free of the traditional restraints.

Among those restraints is dollars and cents. In the most recent fiscal year, I guess it was $52 million plus was spent by the entire Criminal Division of the U.S. Department of Justice and $7 million by the various independent counsels alone. Think about that. To prosecute all of these other bad guys you get $52 million, and you have $7 million over here to go after Ed

Meese and other members of the executive branch. The reason this is so ironic is that in the Watergate crisis, which was the excuse for creation of independent counsel provisions, people went to jail, a president was nearly impeached, and all sorts of things happened. We didn't have an independent counsel then. I believe we are in a very troubling era in terms of separation of powers and particularly in terms of the independent counsel provisions because the structure removes the traditional restraints on the reach of prosecutors.

At a time when I see the Supreme Court doing a lot of things that I sort of applaud, I'm very worried by the concentration of power, basically, in the legislative branch of government. That's what's going on. You have a mechanism triggered by congressional demands. A person is selected by a judicial panel, and technically parked in the executive branch, but doesn't have to report to anyone in the executive branch. To me that sounds like the embodiment of powers. I think that the historical things that Mr. Steer offers are very useful, but you had people performing different functions. I think the difference when you look at the independent counsel provision and some of these other things where the Supreme Court is beginning to wink at mixed powers, the problem is that they're performing one function which is simultaneously judicial, legislative, executive, and you can put quasi in front of all those words and probably be closer to the truth.

Recent Supreme Court Cases

The Supreme Court and other elements of our government have impact on the reach of separated powers and all the other aspects of the Constitution over time. We have several examples in recent Supreme Court cases, including contemporary controversies that underscore that point. For example, the *Frasie* case. This was an example of the Court taking a rather crabbed and narrow view of personal religious liberty. In the *Frasie* case, however, some conservatives criticized and I applauded this case.

The Court, I believe, unanimously upheld the right of a person to observe his or her sabbath. What was involved was a person who was just insisting, sort of like "Chariots of Fire," well, I'm not going to work on the Lord's day, even if it means I lose my job. It's a long complicated case which involved the denial of unemployment benefits to this person who was fired because he refused to work on the sabbath. He didn't belong to any organized religion. It was a very personal thing. The Court in that case strongly endorsed the right of that person to retain all of his rights.

Mr. Fisher raised the point about Rehnquist and Kennedy giving these differing answers to who decides in our society what the meaning of our Constitution is. We might remember from relatively early in the 1988 presidential campaign something that got Pat Robertson in a lot of trouble. In an interview with *The Washington Post* he was asked about whether the Supreme Court decides on all constitutional issues for all of us. And, he says, oh, no, Congress has a role, the executive has a role, the states have a role, the people have a role. Now that's a pretty reasonable answer, it's relatively accurate. Golly, it was coast to coast. He was excoriated for supposedly saying that the Supreme Court plays no role, and that it's just sort of off to the side there, it's this interesting institution and we can ignore it when we want to. That's not what he said, but it shows the lack of understanding about these issues even among elements of the so-called elite, namely newspaper editors, editorial writers and so forth. I could give endless other examples.

The Constitution as Rule Book

What it comes down to for people like me, the perspective I come from, is this little book I bought when I was a freshman at Oklahoma State University. It's getting kind of beat up, I have to tape it all the time. I bought it for fifty cents when I was a freshman in college. It's the Constitution. Now for some people like William Brennan--I disagree with him more than anybody up there, but he's the nicest man on the high court--for people like him this document is "the lodestar" of our aspirations. It's very nice, you can pour anything into those words that you want. That's not what this is, but this is very worthy. It's a rule book.

The Constitution established three branches of government, knowing that in those branches of government would be human beings who would scratch and claw at each other and seek power. So it pits power against power, faction against faction, as Madison would put it, with the understanding that when you put power against

power and faction against faction against faction, over time nobody gets too much power concentrated in any one branch. There was a time in our history, in the era leading up to the Nixon presidency, when too much power was getting concentrated in the executive branch of government. I would say we are currently in an era where too much power is concentrated in the legislative branch of government, to the detriment of the effective administration of the laws. Those are issues.

THE FCC AND THE NEED FOR INDEPENDENT AGENCIES

Stephen Sharp

Explaining constitutional theory to individuals between the ages of twelve and nineteen is a very difficult problem. I think the important thing from my perspective as a practitioner and as a student and an observer is that it is important to separate the theory from the reality and to make all students aware that there is some controversy and complexity involved in this. I'm going to bring concrete examples from my personal experiences involving eight years at the Federal Communications Commission, a little bit of time in Congress, and a number of years practicing as an ordinary lawyer.

First of all, independent agencies were created to isolate economic decision making from political influence and log rolling. The other reason they were created, and now you get the Washington cynic here, is to allow Congress and the executive to deny responsibility for unpopular decisions. It is the ultimate constitutional duck. In at least one case, an agency was created with the pure intention to be ineffective, to serve only as window dressing, to make it look as if something was going to be done, but it was constructed in a manner to ensure that all the major questions would never be resolved. I'm referring to the six-member Federal Election Commission, which has three members from each party. It was a bird designed to fly as well as the Spruce Goose.

A Fundamental Dilemma

Let me focus on some dilemmas that I find peculiar to the Federal Communications Commission, and why it's a little bit different from some of the others, and that just makes the model a little more complex. Initially, back in the 1880s when the Interstate Commerce Commission came into existence, it was primarily for economic decision making. What are the rates? Who gets charged how much? What does it cost? In 1927 the Federal Radio Commission was created, and a few years later it became part of the Federal Communications Commission. Now you are regulating a medium which is, as the phrase goes, "imbued" with the First Amendment. Because the Federal Communications Commission has a role for awarding valuable broadcast franchises, and to police the use of those franchises, then it was considered important to isolate that decision making from partisan and popular political pressures to protect the First Amendment rights of the speakers, that is, the radio owners.

Now that gets into a whole different constitutional issue. What is the role of the First Amendment? How is it constructed? Whose First Amendment is it? Is it the right of people to hear? The right of the press to write? The right of the individual to speak, and, if so, where?

The first question that you have to think about here concerns the concept that careful deliberation by an expert commission is somehow better than public opinion. What is the expertise of a seven- or five-member deliberative body, the Federal Communications Commission, concerning opinions and what should or should not be on television? Are seven people in Washington more expert than 200 and some million people out in the country? A fundamental dilemma.

Once the FCC was created it became an independent regulator. It had a very broad congressional mandate. Immense discretion was granted to this agency, and the agency in the New Deal implemented this quite broadly. It got into every aspect of broadcasting. It jumped into subjects that were hardly contemplated by the Congress but that the commissioners deemed necessary. They looked at the character of individuals. They looked at what was being put on the air and ultimately made decisions.

Decisions Made Often Not Written

Interestingly enough, this administrative agency like many others makes a lot of decisions without ever writing them down. Much of the lore of this agency is oral. It's knowing, or it's

in a file somewhere, but it's never been published. It's very hard to pin them down, and they can do what they want to do.

I'll give you some examples. The agency over the years took a section, Section 319A of the Communications Act. There was a phrase in there that was intended to mean one thing. That intent was specifically stated in the legislative history by several senators. Nonetheless, some bureaucrat read it and said, this means that we have to do it this way. It said the statute basically says the FCC may not give a license unless it's already given a construction permit. Now, a license is operating authority. A construction permit specifies the standards by which the operation is to work. It did not say you had to have a construction permit before you built, only before you operated. But, the bureaucrat decided, no, that was not the way they wanted to do it. They wanted to ensure that the construction permit was issued before anyone actually built anything.

This led to the fine case in Montgomery, Missouri, where a small radio station operator was waiting for his permit. He talked to the bureaucrats in Washington. They said, yep, we're going to grant it just as you've applied for it, looks good to us, no problem. Winter set in and all of his equipment was lying out on the ground and the construction people said if you don't build this in the next thirty days, you're going to have to wait six months. So, he built it.

A competitor twenty miles down the road went to the FCC and ratted on him. He said, he built it and he didn't have a construction permit. So the staff in its wisdom, trying to be equitable, said, well, here's what we'll make you do. We won't deny your license forever, which we could do. We could make sure that you never build this station. What we will do is we will let you build the station, but since you don't have a construction permit, you have to take down the tower, dynamite the concrete pad on which the tower sits, and then, having done that, rebuild it after we issue this construction permit exactly as it is right now. This is a true story. Luckily the seven members of the commission had better political sense than to let this happen.

On a more esoteric note, there is the policy on tender offers and proxy contests recently promulgated by the FCC. Again, it's the unwritten rule and the leverage which the agency has which govern. The FCC went to a great deal of trouble to explain why a tender offer should be treated in two stages so that the FCC would be neutral in any corporate fights and it was keyed to the requirements of the securities regulation in the Williams Act. So, that was all very fine. Everything seemed to work nice and logically until the first friendly tender offer came in. Then the staff informed them that, sorry, the fact that you want to do a tender offer and it's not hostile means that we won't let you use this two-step process. Only hostile offers can use this process. Now, of course, the order didn't say that. The FCC has never publicly admitted this position. Yet nonetheless, anyone with a friendly tender offer who walks into the FCC will find that they can't get it approved. There are a lot of complexities about the marketplace as to why you can't go one step and have a tender offer and have it work very well.

But nonetheless, what it points out is that the FCC is in a position to tell people one way or the other without ever putting it in writing. And, of course, this is not something that anyone can challenge in court, because it's an inaction and it would take a great deal of difficulty to overcome that.

Independence from the Executive -- Not Quite

Now let's talk about independence from the executive. We see the theoretical construct. Here we have an independent agency, insulated from the Congress and from the executive, able to make decisions on an expert basis. Fact? Not exactly. The executive has budget power over the agency. The president submits the budget to Congress so that the agency has to request a certain amount of dollars. Now, of course, each of those dollars is programmed. In the budget process, you don't just get a whole budget for an agency. You get programs in that budget and there's some matter of detail there. And so if the president or the Office of Management and Budget, the president's surrogate there, says we don't like this particular program, they can cut the budget for the FCC when it's submitted to the Congress.

That money won't even be there. There is the possibility of legislative clearance. All bills submitted to Congress must be cleared through

the president and through OMB. That includes draft legislation from the Federal Communications Commission. There is an asserted right to review congressional testimony. That right is still contested.

Then there is the role of the Justice Department, the president's lawyer in determining whether an agency will or will not be defended in court. Now, a normal agency, an executive agency, does not represent itself in court. The EPA has lawyers who go to the Justice Department and say, here's what we want to do and the Justice Department then does it. Now, there is good news and bad news there. Of course, in a very complex, technical area, the EPA lawyers are the ones who really understand what's going on and in all probability the Justice Department lawyers are generalists and have a long learning curve before they're going to figure out what all these things really do.

The FCC on the other hand has independent litigating authority. Congress specifically gave it the right to defend its orders in court. Now, from time to time the Justice Department challenges that. One of my favorite cases involves the private eye who does work for Jack Anderson who thought he had files on him at the FCC. The FCC said, we don't know anything about you, we don't have any files on you. He didn't believe it so he went to court. The members of the FCC voted and denied this request. They just said, we don't have any documents. A GS-15 at the Justice Department took exception to that and said, we will not defend you in court and you may not defend yourselves. Well, the Justice Department failed to file the answer which is required in the legal proceeding. The FCC filed an answer, then Justice filed defendant's motion to strike defendant's answer. And it went downhill from there.

So, the long and short of it is that there are some very direct pressures from the executive. True, the president may not remove a commissioner. The president may, however, fire the chairman and make another commissioner chairman. That requires no confirmation. It can be done at whim.

Slave to Congress

Let's look at the Congress, one of my favorite institutions. Let me tell you about one of my experiences, which is sitting in front of a congressional oversight hearing. Congress first of all fails to take the political bull by the horn and make decisions. It writes a broad statute and says, here, you decide it. This is that deniability aspect. So, they dumped the problem in the FCC's lap. They said, you fix it, and don't bother us. Then someone comes pounding on the congressman's door and says, we don't like what they did. So then the congressman says, well, we better check into this, call the FCC up here.

So they have a hearing. All the members of the committee are sitting up on a raised dais and, of course, very few of them understand any of the issues. They're reading questions written out for them by the staff. They schedule the hearing for 9 o'clock and so the FCC shows up, all five or seven members, and they sit at a table down in front of these people, and about 9:30 or 10 this hearing gets under way. Then they start rotating questions, and essentially they tend to be in the nature of "Have you stopped beating your wife?" Every once in a while the substance shines through, but the important thing is not what is learned from this hearing, but the master/slave relationship.

Of course congressmen come and go, they have votes, they have to leave, they have to go to the bathroom, they just get up and leave. They hold the FCC members sitting at this table for somewhere up to six hours without letting them go to the bathroom. Each congressmen will get up and leave, but none of the FCC people can get up and leave, because that would be disrespectful to Congress. When this is all said and done, it is one of the more excruciating experiences I've ever endured, and I have absolutely no desire to go through it again.

Tugged in Different Directions

Now Congress has said, look, the FCC is a creature of Congress. A creature of Congress to my mind is a congressional staff. Clearly some members of Congress think the FCC and its staff are their employees as well and that the president is essentially irrelevant. That is a problem, of course, while the president is sitting there saying we have to clear your testimony. So, here you are somewhere in the middle and being tugged in at least two different directions.

The problem with this creature of Congress is

that the FCC was created by a statute. The statute is, in fact, voted by Congress, but in order to become law, it has to be signed by a president. The president appoints the members. The Senate confirms them. As a result, I have difficulty with their legal position. However, in all practicality, they may very well be right. In addition to oversight letters, they have a tendency to write nasty letters, and generally the staff makes most of the phone calls, calling up the commissioners and the chairman and saying, "How dare you do this?" As for independence, I think the important thing to recognize in this bizarre process is that independence is in theory, but there are a lot of pressures coming in any given direction.

Of course, we do get letters from the public. In fact, in one case, the public has sent millions of letters opposing a supposed petition by Madeline Murray O'Hair to stamp out religious broadcasting. The petition never had existed. It was never filed, and yet even today, entire truckloads of mail keep coming. I hesitate to think of the amount of money on postage that's been spent on this thing.

One of the things that I want to throw out for consideration is the role of deregulation. The FCC has embarked on a deregulatory trend and it started back in the Carter administration and really took on steam under Reagan and is carried on under Bush. Deregulation comes in several varieties. I spent eight years at the agency and in the first six years, it became very clear to me, as in the case of the tower and construction permit, that the regulations had taken on a life of their own and were not necessarily related to logic or wisdom.

I use the chair analogy. You can either repaint a chair and it will look nice for a while or you can take all the paint off the chair, strip it down to the bare wood, and then start over. The type of deregulation that I focused on when I was at the commission was to strip down to the bare wood. Why is this regulation here? Let's not just tinker with it, put another regulation on top of another regulation, but go back to the basics and say what is it we're trying to accomplish. Identify the goals. if possible, that Congress wanted to achieve. What are the goals on a political basis that society wishes to achieve and then what are the best and most effective mechanisms for achieving those goals? That is essentially the key role of deregulation. First you deregulate the little stuff, the excess logs and paperwork and things like that. That's easy.

Then you get to the tough questions. What is the Fairness Doctrine? What is the role of the First Amendment? The FCC finally concluded that the Fairness Doctrine did not serve the purposes for which it was intended and ultimately would be held unconstitutional. In that process it decided to eliminate the Fairness Doctrine and did so. Congress went bananas. It doesn't like it. It's still trying to relegislate the Fairness Doctrine. It's been vetoed once. It will probably be vetoed again, and the fight goes on. In the process of eliminating the Fairness Doctrine and content regulation, the FCC opens the possibility for several actions.

The Content Business

If you accept the idea that it is necessary to have an insulating body to protect from the partisan pressures such as were found with Spiro Agnew and the Nixon days, where they were trying to pressure media, you need that partisan separation because you are involved in content. Once the FCC is out of the content business, and is awarding licenses on basic criteria and regulating the technical side of things like frequencies and interference, then the question becomes whether an independent agency is necessary to do that. Can that expertise be found or moved to the Department of Commerce or some other agency? Do you need a committee to make the decision of which frequency should be used? I have serious doubts whether that's necessary. There the expertise need no longer be independent. Nor do I think that you need an independent agency to decide how many boxcars go on a particular rail. I think the ICC long since outlived its usefulness and ought to be folded into the executive branch, and a number of these other agencies ought to be rethought.

The only one that I have concerns about is the Federal Communications Commission, not because of my own history but because of that First Amendment issue. As long as the government is in the business of telling people what ought or ought not to be on the air, then you have the danger of tyranny. So, those are some questions that I see that you want to pose and ponder. Those are the types of things which I think will help you in explaining some of these imponderables when you get back home.

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